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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1936 7

No. ~~830~~ 15

ARTHUR G. BOGARDUS, PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 20, 1937.

CERTIORARI GRANTED APRIL 26, 1937.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 830

ARTHUR G. BOGARDUS, PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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[fol. 1]

BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 77,226

ARTHUR G. BOGARDUS, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

DOCKET ENTRIES

Appearances:

For Taxpayer: Arthur M. Kracke (withdrawn); Merlin A. Muth, Esq.; Douglas L. Hatch, Esq.; Richard H. Wilmer; L. G. Sutherland, Esq.

For Commissioner: W. B. Davis, Esq.; Stanley B. Anderson, Esq.

1934.

Aug. 21.—Petition received and filed. Taxpayer notified. (Fee paid.)

" 22.—Copy of petition served on General Counsel.

Sept. 28.—Answer filed by General Counsel.

Oct. 10.—Copy of answer served on taxpayer.

1935.

Jan. 10.—Hearing set February 7, 1935.

" 12.—Notice of appearance of Merlin A. Muth as counsel, filed.

" 12.—Motion for circuit hearing at Chicago, filed by taxpayer. January 14, 1935, granted.

Sept. 30.—Motion to consolidate with dockets 74,916-18, 75,822, 75,875-83, 75,921, 76,228-30, for hearing November 7, 1935, filed by taxpayer. October 1, 1935 granted.

[fol. 2]

Oct. 1.—Hearing set November 7, 1935.

Nov. 2.—Notice of appearance of Richard H. Wilmer as counsel filed.

" 4.—Notice of withdrawal of A. M. Kracke as counsel, filed, and granted.

DOCKET ENTRIES—Continued

1935.

Nov. 7.—Hearing had before Mr. Smith. Submitted. Motion to dismiss in 76,229 held C. A. V. Stipulation of facts filed. Petitioner's brief due December 16, 1935, Commissioner's brief due February 1, 1936, petitioner's reply February 15, 1936.

" 13.—Transcript of hearing November 7, 1935 filed.

Dec. 14.—Brief filed by taxpayer. December 16, 1935 copy served.

1936.

Jan. 30.—Memorandum reply brief filed by General Counsel.

Feb. 15.—Reply brief filed by taxpayer. February 15, 1936 copy served.

Apr. 30.—Memorandum findings of fact and opinion rendered, Mr. Smith No. 5. Judgment will be entered for Commissioner.

" 30.—Decision entered—Mr. Black, Division 15.

July 8.—Motion to fix bond in the amount of $150.00 filed by taxpayer and granted.

" 23.—Supersedeas bond in the amount of $169.56 approved and ordered filed.

" 27.—Petition for review by United States Circuit Court of Appeals, Second Circuit, with assignments of error filed by taxpayer.

" 27.—Proof of service filed by taxpayer.

[fol. 3]

Aug. 19.—Notice of the appearance of Douglas L. Hatch, counsel for taxpayer.

Sept. 1.—Copy of order from Second Circuit re physical exhibit filed.

" 15.—Agreed statement of evidence lodged.

" 15.—Præcipe filed.

" 15.—Proof of service filed.

" 16.—Agreed statement of evidence approved and ordered filed.

" 25.—Order enlarging time for transmission and delivery of record to November 9, 1936, entered.

BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

PETITION—Filed August 21, 1934

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency [fol. 4] (IT:AR:A-2-KVN-90D), dated June 28, 1934, and as a basis of his proceeding allges as follows:

(1) The petitioner is an individual with address at 17 Overlook Terrace, Larchmont, New York.

(2) The notice of deficiency (a copy of which is attached and marked Exhibit A) was mailed to the petitioner on or about June 28, 1934.

(3) The taxes in controversy are income taxes for the calendar year 1931 and for eighty-four dollars, sixty-three cents ($84.63).

(4) The determination of tax set forth in said notice of deficiency is based upon the following errors:

(a) The Commissioner of Internal Revenue erred in including as a part of petitioner's taxable income for the year 1931 the amount of $10,000.00 alleged to be compensation received from Unopco Corporation.

(b) The Commissioner of Internal Revenue erred in asserting a penalty of 25% for failure to file an income tax return within the time prescribed by law.

(5) The facts upon which the petitioner relies as the basis of his proceeding are as follows:

[fol. 5] (a) During the year 1931 the petitioner received from Unopco Corporation the amount of $10,000.00 alleged by the Commissioner of Internal Revenue to be income of the petitioner.

(b) The said amount of $10,000.00 received by the petitioner was a gift and not compensation as alleged by the Commissioner of Internal Revenue.

(c) During the year 1931 petitioner received $807.50 of taxable income, exclusive of the gift described above, and had deductions of $1,458.04 as shown in the attached notice of deficiency (Exhibit A), and petitioner was not required

to file a Federal income tax return for said year under the provisions of Section 51 of the Revenue Act of 1928 and did not file a return for the said year.

(6) Wherefore, the petitioner prays that this Board may hear the proceeding and determine:

(a) That the Commissioner's notice of deficiency was not sent to the petitioner within the period prescribed by law.

(b) That the amount of $10,000.00 received from Unopco Corporation was not taxable income,

(c) That there is no deficiency or penalty due from the petitioner for the calendar year 1931, or

[fol. 6] (d) What is petitioner's income tax liability for said year.

(Signed) Arthur M. Kracke, Counsel for Petitioner,
209 So. La Salle Street, Chicago, Illinois.

Duly sworn to by Arthur G. Bogardus. Jurat omitted in printing.

[fol. 7] EXHIBIT "A" TO PETITION

Copy

Treasury Department,

Washington

Office of Commissioner of Internal Revenue

June 28, 1934.

Mr. Arthur G. Bogardus, 17 Overlook Terrace, Larchmont, New York.

SIR:

You are advised that the determination of your income tax liability for the year 1931 discloses a deficiency of $67.70 and a penalty of $16.93 as shown in the statement attached.

In accordance with section 272 (a) of the Revenue Act of 1928, as amended by section 501 of the Revenue Act of 1934, notice is hereby given of the deficiency mentioned. Within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) from

the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the [fol. 8] attention of IT:C:P-7. The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiency and will prevent the accumulation of interest, since the interest period terminates thirty days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully, Guy T. Helvering, Commissioner, by
(Signed) Chas. T. Russell.

Enclosures: Statement. Form 870.

Statement

IT:AR:A-2
KVN-90D

In re Mr. Arthur G. Bogardus, 17 Overlook Terrace, Larchmont, New York

Income Tax Liability

Year	Income Tax Liability	Income Tax Assessed	Deficiency	Penalty
1931	$67.70	None	$67.70	$16.93

Information submitted to this office indicates that you received a cash distribution of $10,000.00 from the Universal Oil Products Company. This amount represents taxable income to you. Following is a synopsis of your return:

[fol. 9] Line 1—Salary		$250.00
Distribution		10,000.00
Line 3—Interest		136.00
Line 4—Interest		75.00
Line 11—Dividends		346.50
Total Income		$10,807.50
Less:		
Line 13—Interest Paid	$980.00	
Line 14—Taxes Paid	445.04	
Line 17—Contributions	33.00	1,458.04
Adjusted net income		$9,349.46

Computation of Tax

Adjusted net income		$9,349.46
Less:		
Dividends	$346.50	
Personal exemption and credit for dependents	3,900.00	4,246.50
Balance subject to normal tax		$5,102.96
Normal tax at 1½% on $4,000.00		$60.00
Normal tax at 3% on $1,102.96		33.09
Total		$93.09
Less:		
Earned income credit on $10,250.00 (Limited to 25% of normal tax on net income plus 25% of surtax on earned income)	$23.89	
Tax paid at source	1.50	25.39
Income tax liability		$67.70
[fol. 10] Income tax assessed		None
Deficiency		$67.70
25% penalty for delinquency		16.93
Total deficiency and penalty		$84.63

The ad valorem penalty of 25% has been asserted as you failed to file an income tax return within the time prescribed by law.

Before United States Board of Tax Appeals

[Title omitted]

Answer—Filed September 28, 1934

Comes now the respondent, by his attorney, Robert H. Jackson, Assistant General Counsel for the Bureau of Internal Revenue, and for answer to the petition filed herein, admits and denies as follows:

1 and 2. Admits the allegations contained in paragraphs 1 and 2.

[fol. 11] 3. Admits that the taxes in question are income taxes for the year 1931 in the sum of $67.70 plus a penalty of $16.93, totalling $84.63.

4. Denies that the Commissioner erred as alleged in paragraph 4 and each subparagraph thereof.

5(a). Admits the allegations contained in paragraph 5(a).

5(b) and (c). Denies the allegations contained in paragraphs 5(b) and 5(c).

6. denies generally all allegations in the petition not herein admitted.

Wherefore, it is prayed that petitioner's appeal be denied.

(Signed) Robert H. Jackson, Assistant General Counsel for the Bureau of Internal Revenue. Of Counsel: Arthur Carnduff, Special Attorney, Bureau of Internal Revenue.

AC/ES 9/27/34.

[fol. 12] Before United States Board of Tax Appeals

[Title omitted]

Motion to Consolidate—Filed September 30, 1935

Now comes the petitioner above named by his counsel, Merlin A. Muth, and moves as follows:

(1) That the following designated proceedings be consolidated with this proceeding for hearing:

Petitioner	Docket Number
Donald J. Bergman	75881
Maurice S. Beyt	75882
George A. Bockman	75879
Arthur G. Bogardus	77226
Macauley Carter	75880
Gustav Egloff	74917
William F. Hall	76228

Petitioner	Docket Number
Lyman C. Huff	74918
Grace Simpkinson, Executrix of the Estate of Robert M. Kerr, deceased	75875
Bernard G. Lenske	75878
Frank J. Mack	75877
E. M. Matson	75876
Edwin F. Nelson	75822

[fol. 13]

Robert M. Olsen, former Administrator of the Estate of Neal S. Olsen, deceased	76229
Jean Delattre-Seguy	75921
Jonathan L. Walker and Boston Safe Deposit and Trust Company of Boston, Massachusetts, Executors of the Estate of William H. Walker, deceased	76230
James V. Willett	75883

(2) That this proceeding and all of the foregoing designated proceedings be transferred from the circuit calendar at Chicago, Illinois, to the Washington calendar.

(3) That this proceeding and the foregoing designated proceedings be set down for hearing at Washington on November 7, 1935.

In support of this motion it is stated that similar or identical issues are involved in each of these proceedings and it would be of great convenience to the Board and to the petitioners to have the issues tried simultaneously and that the proceedings will be facilitated by hearing on the designated date at Washington.

(S.) Merlin A. Muth, Counsel for Petitioner, 33 North La Salle St., Suite 3000, Chicago, Illinois.

No Objection. (S.) Robert H. Jackson, Assistant General Counsel, for the Bureau of Internal Revenue.

[fol. 14] BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket Nos. 74,916,74,918, 75,822, 75,875-75,883, 75,921, 76,228-76,230, 77,226

JACQUE C. MORRELL, et al.,* Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

Richard H. Wilmer, Esq., Merlin A. Muth, Esq., and L. G. Sutherland, C. P. A., for the Petitioners.

Wliliam E. Davis, Esq., and Stanley B. Anderson, Esq., for the Respondent.

Memorandum Findings of Fact and Opinion

These proceedings, consolidated for hearing, involve deficiencies in petitioners' income taxes for the calendar year 1931 as follows:

Docket No.	Petitioner	Deficiency
74916	Jacque C. Morrell	$1,881.34
74917	Gustav Egloff	19,098.82
74918	Lyman C. Huff	4,641.76
75822	Edwin F. Nelson	426.25

[fol. 15]

75875	Grace Simpkinson, Executrix of the Estate of Robert M. Kerr, deceased	3,645.82
75876	E. M. Matson	90.78
75877	Frank J. Mack	139.34
75878	Bernard G. Lenske	102.29

* Gustav Egloff; Lyman C. Huff; Edwin F. Nelson; Grace Simpkinson, Executrix of the Estate of Robert M. Kerr, deceased; E. M. Matson; Frank J. Mack; Bernard G. Lenske; George A. Bockman; Macauley Carter; Donald J. Bergman; Maurice S. Beyt; James V. Willett; Jean Delattre-Seguy; William F. Hall; Robert M. Olsen, former Administrator of the Estate of Neal S. Olsen, deceased; Jonathan L. Walker and Boston Safe Deposit and Trust Company, of Boston, Massachusetts, Executors of the Estate of William H. Walker, deceased; Arthur G. Bogardus.

Docket No.	Petitioner	Deficiency
75879	George A. Bockman	89.87
75880	Macauley Carter	412.47
75881	Donald J. Bergman	1,347.02
75882	Maurice S. Beyt	72.56
75883	James V. Willett	88.58
75921	Jean Delattre-Seguy	1,613.45
76228	William F. Hall	10,212.79
76229	Robert M. Olsen, former Administrator of the Estate of Neal S. Olsen, deceased	310.77
76230	Jonathan L. Walker and Boston Safe Deposit and Trust Co., of Boston, Mass., Executors of the Estate of William H. Walker, deceased	242.69
77226	Arthur G. Bogardus	67.70
	Penalty	16.93

The principal issue, which is common to all of the proceedings, is whether certain amounts distributed to the petitioners, or those whom they represent in these proceedings, were compensation or tax-free gifts. A further issue is raised as to the jurisdiction of the Board in the appeal of Robert M. Olsen, former Administrator of the Estate of *Neal S. Olsen, deceased, Docket No. 76,229.* The material facts have been stipulated in part.

[fol. 16] FINDINGS OF FACT

The amounts in controversy in these proceedings were a part of a large distribution made by the Unopco Corporation to the petitioners and others who had rendered services, either as employees or in some other capacity, to the Universal Oil Products Co. The distribution was made after a portion of the assets of the latter company, which were excluded from the sale, had been transferred to Unopco Corporation and all of the stock of Universal Oil Products Co. had been sold to outside interests. At the time of the sale the shares of stock of both corporations were owned by the same stockholders in the same proportion.

Universal Oil Products Co., hereinafter referred to as Universal, is a South Dakota corporation organized in 1914. Its only asset in the beginning was an application for a patent on a process for refining petroleum and manufacturing

gasoline. Since that time it has been engaged in the business of developing that and other patents which it subsequently acquired and in licensing them to various producers on a royalty basis. It received its first royalty payments of a few thousand dollars in 1922. From that time on its business improved rapidly. The process which it had developed was then gaining wide recognition in the industry and within the next few years many licenses for use of its patents and inventions were granted to oil refining companies throughout the country. By 1929 its royalties amounted to about $8,000,000 and by 1930 to about $9,000,000.

[fol. 17] In 1930 interested parties began to negotiate for the purchase of the stock of Universal and on January 2, 1931, an agreement was entered into for the sale of all of Universal stock to United Gasoline Corporation for $25,000,000. This agreement was consummated on January 6, 1931.

Prior to the sale of Universal stock and in contemplation of such a sale, the Unopco Corporation, hereinafter referred to as Unopco, had been organized for the purpose of acquiring some of Universal's assets which were to be excluded from the sale. Accordingly, and under the terms of the sale agreement of January 2, 1931, certain of the so-called "liquid assets" of Universal consisting of cash, securities, accounts receivable, etc., of a value of approximately $4,100,000 were transferred to Unopco. It was provided in the sale agreement that a part of the proceeds of the sale of Universal stock and a certain amount of the assets transferred to Unopco should be held as a "guarantee fund" for payment of Universal's unsettled liabilities.

Up to the time of the sale of Universal stock Unopco had never engaged in any business activities. Since that time its only business has been the investment and management of the assets acquired by it in that transaction. Under its new ownership Universal continued to carry on the same business, retaining a large part of its assets. All of the former stockholders of Universal became stockholders of Unopco with the same proportionate holdings. None of them thereafter held any stock in Universal or the purchasing corporation, United Gasoline Corporation.

A few days after the sale of Universal stock its former [fol. 18] stockholders, who were then the stockholders of Unopco, held a meeting at which it was proposed that they

show their appreciation for the loyalty and support of some of the employees of the company (Universal) by making them a "gift" or "honorarium." Such a resolution was formally adopted at a meeting of the board of directors of Unopco on January 9, 1931, and by the stockholders on January 10, 1931. The latter resolution was as follows:

"Resolved, that the following recommendations made by the Board of Directors to the stockholders of this Corporation in the meeting of the Board of Directors held on January 9, 1931, viz.:

That the sum of Six Hundred Seven Thousand Five Hundred Dollars ($607,500.) be appropriated, paid and distributed as a bonus to sixty-four (64) former and present employees, attorneys and experts of Universal Oil Products Company (the corporation of that name referred to in the meeting of this Corporation held on the fifth and sixth days of January, 1931) in recognition of the valuable and loyal services of said employees, attorneys and experts to said Universal Oil Products Company; such sum to be distributed among said sixty-four (64) employees, attorneys and experts in such amounts to each employee, attorney and expert as the Board of Directors of this corporation shall determine;

be and the same are hereby in all things approved; and

Resolved Further, that this Corporation do appropriate, [fol. 19] pay and distribute the said sum of Six Hundred Seven Thousand Five Hundred Dollars ($607,500.) as a bonus to sixty-four (64) former and present employees, attorneys and experts of said Universal Oil Products Company; in recognition of the valuable and loyal services of said employees, attorneys and experts to said Universal Oil Products Company; said sum to be distributed among said sixty-four (64) employees, attorneys and experts in such amounts to each employee, attorney and expert, as the Board of Directors of this Corporation shall determine."

Thereafter, a list of those who were to receive the payments authorized by the above resolution was prepared by the officers of Unopco. The payments ranged in amount from $100,000 to $500. The amounts of such distribution received by the above named petitioners, or those whom the petitioners represent, were as follows:

Jacque C. Morrell	$25,000
Gustav Egloff	100,000
Lyman C. Huff	40,000
Edwin F. Nelson	10,000
Robert M. Kerr	40,000
E. M. Matson	5,000
Frank J. Mack	5,000
Bernard G. Lenske	5,000
George A. Bockman	5,000
Macauley Carter	10,000
Donald J. Bergman	20,000
Maurice S. Beyt	5,000
James V. Willett	5,000
Jean Delattre-Seguy	25,000
[fol. 20] William F. Hall	50,000
Neal S. Olsen	10,000
William H. Walker	10,000
Arthur G. Bogardus	10,000

All of those to whom the payments were made were at that time, or had been, employees, attorneys, or experts of Universal, except one of the recipients who was the sister of an employee who had been killed in an accident.

All of the amounts distributed were paid by checks of Unopco which were either delivered in person or mailed out by the president of the corporation. In presenting the checks the president stated that the payments were gifts from the stockholders of the corporation and need not be reported in income tax returns.

None of the above named recipients was ever employed by Unopco or by any of the former stockholders of Universal.

It is stipulated that neither Unopco nor any of its stockholders, nor the stockholders of Universal was at any time under any legal or other obligation "to pay any of said employees, attorneys or experts, including petitioners, any salary, compensation or consideration of any kind."

Neither Unopco nor Universal nor United Gasoline Corporation, nor any of the stockholders of those companies ever made or claimed any deduction for Federal income tax purposes of the above payments made to the petitioners and others. In the books of Unopco the payments were charged to surplus account in January, 1931.

Neal S. Olsen, whose petition in these proceedings was filed [fol. 21] by Robert M. Olsen, former administrator, Docket No. 76,229, died on December 13, 1931. The administrator of his estate, Robert M. Olsen, the petitioner herein, was discharged as administrator and the estate closed prior to March 9, 1934, the date of the deficiency notice which was addressed to "N. S. Olsen." As administrator of the decedent's estate, Robert M. Olsen, on March 11, 1932, filed an income tax return for the decedent for the period January 1 to December 13, 1931. The deficiency notice which was addressed to the decedent Neal S. Olsen was received by the petitioner Robert M. Olsen who filed the petition herein.

SMITH: OPINION

In support of their contentions that the payments in question were gifts and not compensation, the petitioners rely upon Jones v. Commissioner, 31 Fed. (2d) 755; reversing 10 B. T. A. 202; Blair v. Rosseter, 33 Fed. (2d) 286; affirming 12 B. T. A. 254; Lunsford v. Commissioner, 62 Fed. (2d) 740; reversing 22 B. T. A. 881; and Cunningham v. Commissioner, 67 Fed. (2d) 205; reversing Board's unreported Memorandum Opinion. In Jones v. Commissioner, supra (C. C. A., 3rd Cir.), the court held that certain payments made by the former stockholders to the former officers and employees of two affiliated corporations which had just sold their assets to another corporation were not taxable to the recipients as compensation from the corporations but were gifts from the individual stockholders. The court distinguished Noel v. Parrott, 15 Fed. [fol. 22] (2d) 669, on the facts, pointing out that the payments in that case were made by the corporation and not by the stockholders and that the corporation claimed the deduction of the amounts in its income tax returns. The Board had taken the view that the payments were in effect made by the corporation since they had been agreed upon by the directors before the sale was made and the sale price as originally agreed upon had been increased to cover the payments.

Blair v. Rosseter, supra, involved a payment of $50,000 made by a corporation to its president "in recognition of his able and successful direction of the affairs of the company during the past ten years." The payment was designated in the corporate resolution as a "gift" and on the

evidence adduced was so determined by the Board and by the reviewing court. Although that case was decided specifically on questions of fact and did not lay down any general rule as to the taxability or nontaxability of payments of that character, its general import appears to be in conflict with the views of the Board and some of the courts as expressed in later cases. Particularly is this true with respect to the inference to be gained from the following language contained in the court's opinion and quoted by the petitioners in their brief in these proceedings:

> • • • On the other hand, the decision of the Board of Tax Appeals finds direct support in Jones v. Commissioner of Internal Revenue (C. C. A.) 31 F. (2d) 755, where it was held that a part of the proceeds of a sale of [fol. 23] stock distributed to the administrative staff of corporations, *without obligation on the part of the stockholders, or any consideration other than recognition of past faithful services, constituted a gift, and not taxable income.* (Italics supplied.)

In Lunsford v. Commissioner, supra, the court, although recognizing that taxable compensation might be received as a purely voluntary payment for past performed services, citing Old Colony Trust Co., et al. v. Commissioner, 279 U. S. 716; Noel v. Parrott, supra; Fisher v. Commissioner, 59 Fed. (2d) 192, and other cases, held that the payment there in question was not of that character but was a "gift." "On the other hand," the court said in its opinion, "voluntary payments made to employees without any obligation to do so, or in consideration of past services already compensated for by salary, have been held to be gifts, and not taxable income to the payee." Citing Jones v. Commissioner, supra; Blair v. Rosseter, supra. The court pointed out, however, that the recipient was not employed by and had never performed any services for the corporation making the payment except that he was instrumental in bringing about the sale of the corporation's assets to another corporation of which he was an officer.

In Cunningham v. Commissioner, supra, the retiring president of a corporation whose stock had recently changed hands was paid $15,000, the amount of his yearly salary, as an hororarium "in appreciation of Mr. Cunningham's excellent guidance of this Corporation through times

[fol. 24] of difficulty and depression." The court held, reversing the decision of the Board, that the amount was a gift and was not taxable income to the recipient. In its opinion, the court said:

* * * The company was under no obligation to pay him. He had performed no service other than the duties of his office, for which he had been paid. The money was "awarded" to him; it was called an "honorarium," and that word, in common understanding, means voluntary reward for that for which no remuneration could be collected by law. It is clear to us that the money was a gift, a voluntary honorarium, and was freely given without any legal liability existing to necessitate such payment. It was so treated by the board of directors, and their having their stockholders ratify their action evidences the board's view that their gift of the stockholders' money should have the latter's approval.

It does not follow because a corporation is not under any legal obligation to pay an amount which it does pay to an officer or an employee or one who has rendered services that the amount is not compensation but a tax-free gift. The Supreme Court so stated in Old Colony Trust Co., et el. v. Commissioner, supra. The court there said:

Nor can it be argued that the payment of the tax in No. 130 was a gift. The payment for services, even though en-
[fol. 25] tirely voluntary, was nevertheless compensation within the statute. This is shown by the case of Noel v. Parrott (C. C. A.) 15 F. (2d) 669. * * *

The facts in the instant case are similar to those in Noel v. Parrott, supra. There, a corporation in anticipation of a sale of all of its assets or stock voted a "gratuitous appropriation" to be distributed to certain of its officers and employees. The Board held, 1 B. T. A. 1, that the amount of $35,000 so distributed to the company's superintendent was taxable income to him and was not a gift. The Board's decision was affirmed by the Circuit Court of Appeals for the Fourth Circuit. The court said:

* * * This negatives the idea that a gift was intended; for the distribution was to be made to those who had rendered services to the company; i. e., to those from whom the company had received a consideration in the past. * * *

* * * * * * *

When we view the resolutions of July 14, 1919, and the efforts to sell the stock or physical properties of the corporation in connection with what was done upon the sale to Atwater & Company (and, of course, this is the proper way to view the facts), it is apparent that the resolutions directing distribution to the officers and employees named were passed in anticipation of a sale of either the stock or the physical properties of the corporation, and were intended, not to make a gift to the officers and employees [fol. 26] named, but to grant them additional compensation for services theretofore rendered as well as compensation for bringing about the sale and for the loss of their positions expected to result therefrom. When the sale was actually made the terms of sale were so fixed that the officers and employees named in the resolution would receive the compensation therein provided. The payment to them, therefore was not without consideration, as in case of a gift. The consideration was their previous service to the company, the relinquishment of their positions, the sale of their stock, and the efforts which they, or some of them, put forth to bring about the sale of all of the stock of the corporation. * * *

In Weagant v. Bowers (C. C. A., 2nd Cir.), 57 Fed. (2d) 679, the court said that:

* * * There is authority for the proposition that it is not enough to show that a payer was under no legal duty to pay and that "additional compensation" paid for past services may constitute taxable income. * * *

Citing:

Noel v. Parrott, supra; Old Colony Trust Co., et al. v. Commissioner, supra, and other cases.

Bass v. Hawley (C. C. A., 5th Cir.), 62 Fed. (2d) 721, one of the cases relied upon by the respondent, also in- [fol. 27] volved facts similar to those in the instant proceedings. There, the corporation, an operating company, which the taxpayer had served as auditor for a number of years, changed ownership through the sale of all of its stock by a holding company and the holding company voted to distribute a part of the proceeds of the sale to certain employees of the operating company. The distribution

was referred to by the directors and stockholders as "additional compensation * * * in recognition of the long and faithful service" and "bonuses to employees." The taxpayer there received $32,500 of such distribution. In holding that the amount constituted taxable income the court said:

The Board of Tax Appeals and the Court of Claims have reached opposite conclusions as to the taxability of this distribution. Barnes v. Commissioner, 17 B. T. A. 1002; *Schumacher* v. *United States* (Ct. Cl.) 55 F. (2d) 1007. Hawley relies strongly on Jones v. Commissioner (C. C. A.) 31 F. (2d) 755, and Blair Commissioner v. Rosseter (C. C. A.) 33 F. (2d) 286. Each of these cases in holding payments to employees to be nontaxable gifts relies on the fact that there was no obligation to pay and the payments were over and above the wages and salaries due. The controlling importance of that fact has since been denied by the Supreme Court in Old Colony Trust Co. v. Commissioner, 279 U. S. at page 730, * * *

* * * Section 213 of the Revenue Act of 1926 (26 [fol. 28] U. S. C. A. § 954) here applicable includes in gross income to be taxed "gains, profits, and income derived from salaries, wages, or compensation for personal service * * * of whatever kind and in whatever form paid." It excludes property acquired by "gift, bequest, devise or inheritance." The intent is that all receipts in whatever form that come because of labor and service, whether payment could be compelled or not, shall be taxed as arising from labor. That only is a gift which is purely such, not intended as a return of value or made because of any intent to repay another what is his due, but bestowed only because of personal affection or regard or pity, or from general motives of philanthropy or charity. Those payments made because of past services, but over and above what was contracted and compellable to be paid, have been called additional compensation and bonuses, and are taxable income to the recipient. From the standpoint of the payer also they are recognized as disbursements for wages or salaries, and when paid in the conduct of a regular business may be deducted as an expense thereof. See Regulations 69, art. 108. * * *

William C. Barnes, 17 B. T. A. 1002, referred to in the above quotation, was later overruled by the Board in

Thomas M. Schumacher, 27 B. T. A. 895, in which we followed Schumacher v. United States, 55 Fed. (2d) 1007.

The petitioners stress the facts that none of the beneficiaries of the distribution here was or or ever had been an [fol. 29] employee of Unopco, the company making the distribution, and that the payments were authorized and made by that company after the sale of Universal stock to outside interests. It is apparent, however, that in making the distribution Unopco recognized and assumed the obligations of universal to those officers and employees. The resolutions of the board of directors and stockholders of Unopco authorized the payments "in recognition of the valuable and loyal services of said employees, attorneys and experts to said Universal Oil Products Company." Unopco was to all intents and purposes a continuation of Universal under another name. It had the same stockholders with the same proportionate holdings. It was organized in anticipation of the sale of Universal stock to receive and hold the so-called "liquid assets" of Universal which were to be excluded from the sale. The situation was similar to that in Bass v. Hawley, supra; Schumacher v. United States, supra; and Thomas M. Schumacher, supra, with respect to which the Court of Claims in Schumacher v. United States, supra, said:

> It is immaterial that the payment received by the plaintiff was made by the holding company rather than by the company for which he had rendered services. The entire capital stock of the railroad company was owned by the holding company. The economic interests of the two companies were identical. The purchase price received from the sale of the railroad company went to the holding company. That the money received by the plaintiff was not paid directly by the railroad company but was paid by the [fol. 30] stockholder's committee of the holding company does not change the essential character of the transaction, and make a gift out of what was intended to be, and in fact was, additional compensation for services rendered.

The initial step in bringing about the payments here in controversy was described by the attorney for Universal who participated in the transaction, as follows:

> A. Some three days, possibly, after the sale had been consummated on January 6th, the old stockholders of Uni-

versal met around the table and discussed various things, the investment and re-investment of monies in Unopco, and the general policy to be pursued. And in the course of that conference Mr. H. J. Halle, who was President of Universal Oil Products Company, and became President of Unopco Corporation, said that we had reason to congratulate ourselves on our very great good fortune in this company which started with nothing, to all intents and purposes, and had been built up in this phenomenal way; and we had all profited very largely; and during these years while we were struggling and moving forward, we had had the loyal support of a number of employees most particularly, and he thought it would be a nice and generous thing for us to show our appreciation and to remember them in the form of a gift or honorarium; * * *

Soon afterwards, the formal resolution authorizing the [fol. 31] payments "as a bonus to sixty-four (64) former and present employees, attorneys and experts of said Universal Oil Products Company; in recognition of the valuable and loyal services of said employees, attorneys and experts to said Universal Oil Products Company" was passed by the directors and stockholders of Unopco. The use of the word "bonus" and the phrase "in recognition of the valuable and loyal services" strongly indicates that the payments were intended as compensation for past services rendered to Universal. See Bass v. Hawley, supra; Schumacher v. United States, supra. We do not think that the inference to be drawn from the formal resolution is changed by the statement made to the recipients by the president of Unopco in delivering the checks that they were "gifts" and need not be reported in income tax returns. As the above cited cases illustrate, what constitutes a tax-free gift within the meaning of the revenue statutes is often difficult to determine. Very reasonably the corporation's president, in misconception of the law, might have considered the bonuses or additional compensation as gifts. In determining whether they were in fact and in law gifts or compensation we must look to all of the attending circumstances. Noel v. Parrott, supra; Bass v. Hawley, supra; and Fisher v. Commissioner, supra.

Statements made by the parties at the time of the transaction may tend to show their intentions but are not always

the most reliable criteria. In Levey v. Helvering, 68 Fed. (2d) 401; 62 App. D. C. 354; affirming 26 B. T. A. 889, the court held that an amount paid by a corporation to one of its officers, although described as a gift in the corporate [fol. 32] resolution, was nevertheless taxable as additional compensation. We held in C. B. Wilcox, 27 B. T. A. 580, that a payment of $50,000 made to an officer of a corporation out of the proceeds of the sale of the corporation's stock, although designated a gift by the president of the selling corporation, was nevertheless compensation taxable to the recipient.

The petitioners call attention to the fact that no claim for a deduction of the payments was made in the income tax returns of any of the corporations involved or the individual stockholders. A similar situation existed in Bass v. Hawley, supra, with respect to which the court said:

> Against this conclusion is put forward the fact that neither the Holding Company nor the committee claimed a deduction for the payment in their tax returns. It is true that a payment which is a gift as respects the payer, and so not deductible, will likely be a gift in the hands of the recipient and not taxable, but it is not true that because a payment may not have been taken as a deduction by the payer that it cannot be taxed as income to the recipient. The former may have overlooked or waived his right to deduct, which would not relieve the latter from his duty to pay taxes. Or it may happen that the payer was not, when the obligation was asumed and the payment made, engaged in business and so not within the statute allowing the deduction. This seems probable in this case.

[fol. 33] From a careful consideration of all the evidence before us, we conclude that the payments made by Unopco to the petitioners and others were additional compensation in consideration of services rendered to Universal and were not tax-free gifts.

At the hearing before the Board, counsel for the petitioners moved the dismissal of the petition of Robert M. Olsen, former administrator of the Estate of Neal S. Olsen, deceased, Docket No. 76,229, for want of jurisdiction. The contention is made that the Board is without jurisdiction because the petition was filed from a deficiency notice sent to the decedent, Neal S. Olsen, and that the petition was filed

by the former administrator of the estate who had been discharged prior to the mailing of the deficiency notice. The contention, we think, is without merit. Admittedly the deficiency notice was received by the petitioner who had administered the decedent's estate and a petition to review the decedent's tax liability was timely filed by him. These facts are sufficient to confer jurisdiction of the proceeding on the Board. See Haag v. Commissioner, 59 Fed. (2d) 516; McCarthy v. Commissioner, 80 Fed. (2d) 618; Bankers Trust Co., Trustee, 24 B. T. A. 10; Waldemar R. Helmholz, Executor, 28 B. T. A. 165; Edwin W. Eisendrath, 28 B. T. A. 744. In Haag v. Commissioner, supra, the deficiency notice had been sent to the executrix after the estate had been closed and the executrix dismissed. The executrix received the notice and filed a petition with the Board. In holding that the Board had jurisdiction the court said, citing Whit-
[fol. 34] mer v. Lucas, 53 Fed. (2d) 1006; Commissioner v. New York Trust Co., et al., 54 Fed. (2d) 463; Burnet v. San Joaquin Fruit & Investment Co., 52 Fed. (2d) 123; American Auto Trimming Co. v. Lucas, 37 Fed. (2d) 801, that:

> • • • These cases hold that although the notice was not directed to the proper party, nevertheless if it appeared that the proper party had received the notice or that the party who succeeded to the title of the party filing the return had received the notice, it was sufficient.

The motion of counsel for the petitioners to dismiss the petition in Docket No. 76,229 is denied.

Judgments will be entered for the respondent.

Enter:
Entered April 30, 1936.
(Seal.)

[fol. 35] BEFORE UNITED STATES BOARD OF TAX APPEALS, WASHINGTON

Docket No. 77,226

ARTHUR G. BOGARDUS, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

DECISION

Pursuant to the determination of the Board, as set forth in its Memorandum Findings of Fact and Opinion entered April 30, 1936, it is

Ordered and Decided: That there is a deficiency of $67.70, plus a penalty of $16.93, for the calendar year 1931.

Enter:

Entered April 30, 1936.

(Signed) Eugene Black, Member.

[fol. 36] IN UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE SECOND CIRCUIT

[Title omitted]

PETITION FOR REVIEW—Filed July 27, 1936

To the Honorable, the Judges of the United States Circuit Court of Appeals for the Second Circuit:

Now comes Arthur G. Bogardus, the petitioner herein, a citizen of the United States and of the State of New York and a resident of Larchmont, New York, and in support of this his petition filed in pursuance of the provisions of Section 1001 of the Revenue Act of 1926, as amended, for the review of the decision and order, hereinafter described, of the United States Board of Tax Appeals rendered on April 30, 1936, respectfully shows to this Honorable Court as follows:

I. Statement of the Nature of the Controversy

1. On June 28, 1934, the Commissioner of Internal Revenue, the respondent herein, mailed to the petitioner by reg-

[fol. 37] istered mail a notice of the determination of an asserted deficiency in income tax in the amount of $67.70 plus penalty of $16.93 for alleged failure to file on time his income tax return claimed by the respondent to be due from the petitioner for the calendar year 1931 under and by virtue of the provisions of the Revenue Act of 1928. On August 21, 1934, the petitioner duly filed with the United States Board of Tax Appeals (hereinafter called the Board) a petition for the redetermination of said asserted deficiency.

2. Said asserted deficiency in income tax claimed by the respondent to be due from the petitioner resulted from the inclusion in gross income for the calendar year 1931 under Section 22 (a) of the Revenue Act of 1928 of the amount of $10,000 received from Unopco Corporation (hereinafter called Unopco).

3. The petitioner was an employee of Universal Oil Products Company (hereinafter called Universal). For the year 1930, he had been paid in full by Universal his agreed compensation and also the usual bonus paid by Universal as additional compensation. On January 6, 1931, all the stockholders of Universal, pursuant to a purchase agreement dated as of January 2, 1931, sold all of their stock in Universal to United Gasoline Corporation (hereinafter called United). Those stockholders became stockholders in Unopco (a corporation to which certain assets of Universal were transferred under conditions set forth in the aforesaid purchase agreement) in substantially the same proportions in which they had been stockholders in Universal and ceased [fol. 38] entirely to be stockholders in Universal and were never stockholders in United and had no further interest in either of said corporations. The petitioner has never been an employee of Unopco or of any of its stockholders, and neither Unopco nor any of its stockholders were ever under any obligation to pay anything to the petitioner.

4. After the aforesaid sale had been consummated the stockholders of Unopco voluntarily determined to make payments of money to certain of the present and former employees, experts and attorneys of Universal, without any obligation of any kind whatsoever to make such payments. That determination was carried into effect by virtue of resolutions adopted by the Board of Directors and by the stockholders of Unopco in their respective meetings held on

January 9 and 10, 1931. The petitioner was among those selected as recipients, receiving from Unopco $10,000. The petitioner, along with other recipients, was advised by Unopco that the amount paid to him was a gift and was not taxable income. He, as well as Universal, Unopco and the latter's stockholders, treated it accordingly, and neither Universal, Unopco nor the latter's stockholders made any deductions in their income tax returns on account of such payment. The respondent, however, determined that the amount so received constituted additional compensation to be included in his taxable income for the calendar year 1931.

5. The petitioner contended in his appeal before the Board that the aforesaid amount was not taxable income under Section 22 (a) of the Revenue Act of 1928, but con- [fol. 39] stituted a gift and, under Section 22 (b) (3) of the Revenue Act of 1928, was not taxable income.

6. The respondent contended that the amount so received constituted additional compensation and thus was taxable income.

7. On April 30, 1936, the Board promulgated its memorandum findings of fact and opinion whereby it decided that the amount of $10,000 received by the petitioner from Unopco constituted additional compensation and was taxable income within the meaning of Section 22 (a) of the Revenue Act of 1928.

8. On April 30, 1936, the Board rendered, and entered in its records, a decision and order in accordance with its said opinion whereby it determined that the amount of the deficiency in income tax due from the petitioner for the calendar year 1931 was $67.70 plus penalty of $16.93.

II. Declaration of the Court in Which the Review is Sought

The petitioner, feeling aggrieved by said decision and order, hereby petitions for the review thereof by the United States Circuit Court of Appeals for the Second Circuit, in which Circuit is located the office of the Collector of Internal Revenue to which was made the return in respect of which the liability involved in this appeal arises.

III. Assignment of Errors

The petitioner as a basis for the review of said decision and order makes the following assignment of errors:

[fol. 40] 1. The Board erred in that it did not decide and hold that the amount of $10,000 received by the petitioner from Unopco in 1931 constituted a gift.

2. The Board erred in deciding and holding that the amount of $10,000 received by the petitioner from Unopco in 1931 constituted taxable income for the calendar year 1931 as additional compensation.

3. The Board erred in not deciding and holding that the amount of $10,000 received by the petitioner from Unopco in 1931 under the facts and circumstances and the law applicable thereto constituted a gift that was non-taxable under Section 22 (b) (3) of the Revenue Act of 1928.

4. The Board erred in deciding and holding that the amount of $10,000 received by the petitioner from Unopco in 1931 under the facts and circumstances and the law applicable thereto did not constitute a gift that was non-taxable under Section 22 (b) (3) of the Revenue Act of 1928.

5. The Board erred in deciding and holding that the amount of $10,000 received by the petitioner from Unopco in 1931 under the facts and circumstances and the law applicable thereto, constituted taxable income of the petitioner for the calendar year 1931 under Section 22 (a) of the Revenue Act of 1928.

6. The Board erred in not deciding and holding that the amount of $10,000 received by petitioner from Unopco in 1931 under the facts and circumstances and the law applicable thereto did not constitute taxable income of the petitioner for the calendar year 1931, under Section 22 (a) of the Revenue Act of 1928.

[fol. 41] 7. The Board erred in not deciding and holding that there was no deficiency due by the petitioner in respect to his income tax for the calendar year 1931.

8. The Board erred in deciding and holding that there was a deficiency in income tax of the petitioner for the cal-

endar year 1931 in the amount of $67.70 plus penalty of $16.93.

9. The Board erred in that its decision and order is not supported by the evidence.

10. The Board erred in deciding and holding contrary to the evidence.

11. The Board erred in deciding and holding contrary to the law.

12. The Board erred in its decision for other reasons apparent of record.

Wherefore, your petitioner prays that said decision and order of the Board be reviewed and reversed by the United States Circuit Court of Appeals for the Second Circuit in accordance with law and for such other and further relief as said Court may deem meet and proper in the premises.

Arthur G. Bogardus, Petitioner, by (S.) Richard H. Wilmer, Attorney of Record for Petitioner. (S.) Richard H. Wilmer, Merlin A. Muth, L. G. Sutherland, Attorneys for Petitioner.

[fol. 42] *Duly sworn to by Richard H. Wilmer. Jurat omitted in printing.*

[fol. 43] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

NOTICE OF FILING PETITION FOR REVIEW—Filed July 27, 1936

To Guy T. Helvering, Esq., Commissioner of Internal Revenue, Washington, D. C.

SIR:

Please Take Notice that on the 27th day of July, 1936, Arthur G. Bogardus, the petitioner in the above-entitled proceeding, filed, with the Clerk of the United States Board of Tax Appeals, the petition of said petitioner, a copy of which is annexed hereto, for the review by the United States Circuit Court of Appeals for the Second Circuit of the

[fol. 44] decision and order of said Board rendered and entered in its records in the above-entitled proceeding on April 30, 1936.

Washington, D. C., July 27, 1936.

(S.) Richard H. Wilmer, Merlin A. Muth, L. G. Sutherland, Attorneys for Petitioner, Arthur G. Bogardus.

Admission of Service

Receipt of the foregoing notice of filing of petition for review and service of a copy of the petition therein mentioned is acknowledged this 27th day of July, 1936.

(S.) Herman Oliphant, General Counsel for the Department of the Treasury, Attorney for the Respondent.

[fol. 45] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

[Title omitted]

Statement of the Evidence—Filed September 16, 1936

The above-entitled cause came on for hearing before the Honorable Charles P. Smith, Member of the United States Board of Tax Appeals, on the 7th day of November, 1935.

STIPULATION

Prior to the introduction of testimony it was stipulated between counsel for the petitioner and the respondent that copies of the 60-day deficiency letter from the Commissioner attached to the petition should be received in evidence with equal force as if the original letter was introduced. Said 60-day deficiency letter is printed elsewhere in the record and is incorporated by reference herein. Counsel for the petitioner then presented and there was received as part of the record the stipulation of facts, including Exhibits A to K thereof, which had been signed by counsel for the petitioner and the respondent and is printed elsewhere in this record and is incorporated by [fol. 46] reference herein. While conceding the correctness of the statements made in the stipulation and the fact that

the copies of certain letters comprising Exhibits B to K inclusive to said stipulation were true copies thereof, counsel for the respondent objected to the introduction of said letters and to the statements made in the stipulation with regard to what H. J. Halle said to recipients of payments concerning the nature of the payments on the ground of irrelevancy and immateriality and as being in conflict with the express language of the resolutions authorizing such payments. Such objections were overruled and exceptions were noted.

Counsel for the petitioner offered and there were received in evidence the Petitioner's Exhibits Nos. 1, 2 and 3 annexed hereto as part of this Statement of Evidence. Counsel for the respondent, while conceding the correctness of the contents thereof, objected to the introduction of the Petitioner's Exhibits Nos. 1 and 2 on the ground that they were irrelevant and immaterial; his objection was overruled and exception noted.

The petitioner, to maintain the issues on his behalf, introduced the following testimony:

ALEXANDER F. REICHMANN, being first duly sworn, testified that he was a resident of Chicago, Illinois, a member of the bar of that state, and a member of the firm of Judah, Reichmann, Trumbull, Cox & Stern; that he was associated in Universal Oil Products Company (hereinafter called [fol. 47] Universal) from the beginning of its organization and had helped organize it, keeping in very close touch with it up to the time of the sale in 1931; that in 1914 Universal, then known as National Hydro-carbon Company, upon exercise of an option given in 1913, received the assignment of a certain gasoline cracking patent application then pending. The patent was finally issued in January, 1915. Upon the advancing of large amounts of money to Universal work was immediately begun to develop the gasoline cracking process under this patent, such preliminary experimental work running from 1915 to approximately 1922. In 1919 Universal entered into its first license contract. The purpose of Universal was to develop the process to its ultimate conclusion of efficiency and then to establish a licensing system in consideration of royalties to be paid. In 1922 the first royalty payment of a few thou-

sand dollars was received. From then on the process had been developed and the appliances and apparatus with which to utilize the process had been developed to such an extent that it obtained universal recognition of the oil refining industry, resulting in the making of a great many license contracts. From 1922, when only a few thousand dollars were obtained in the way of royalties, the growth of Universal was literally phenomenal. Many license contracts were entered into. By 1929 the royalties aggregated in the neighborhood of $8,000,000 and by 1930 over $9,000,000. In 1930 interested parties began to negotiate for the purchase of the stock of Universal, resulting in a purchase agreement entered into on January 2, 1931. Under the pur-
[fol. 48] chase agreement the stockholders of Universal and those having certain contractual relations with Universal by which they were to receive percentages of profits sold all their stock and interests, respectively, in Universal for approximately $25,000,000, retiring completely from Universal, and in addition to that received all the stock of Unopco Corporation (hereinafter called Unopco), into which company Universal transferred certain assets of a value of more than $4,000,000 in accounts receivable, bills receivable, money, and securities and other property. Unopco had been organized a year or two before in anticipation of a possible sale which was never consummated, but Unopco had been kept alive so that it was still available when this new agreement was entered into. All of the stock of Universal was sold to United Gasoline Corporation (hereinafter called United). The above-described assets of Universal were transferred to Unopco before the sale of the stock of Universal was consummated, and all the stockholders of Universal became stockholders of Unopco in substantially the same proportion that they had owned stock in Universal. The witness had participated in the drafting of and negotiations for the purchase agreement and had participated in every discussion in connection therewith. The purchase agreement dated as of January 2, 1931, was carried out in all its details.

The sale of the stock was consummated on January 6, 1931, and some three days thereafter the old stocholders of Universal "met around the table and discussed various things, the investment and re-investment of monies in Unopco, and the general policy to be pursued." In the
[fol. 49] course of that conference Mr. H. J. Halle, who

was President of Universal and had become President of Unopco, said, to use the witness's words, that "we had reason to congratulate ourselves on our very great good fortune in this company which started with nothing, to all intents and purposes, and had been built up in this phenomenal way; and we had all profited very largely; and during these years while we were struggling and moving forward, we had had the loyal support of a number of employees most particularly, and he thought it would be a nice and generous thing for us to show our appreciation and to remember them in the form of a gift or honorarium; and he suggested that that be considered; and all of the stockholders acquiesced and were glad to do it; and the result was that it was understood that we would come forward and make these presents or gifts to these employees that were to be slated for it." Counsel for the respondent moved that the testimony above quoted be stricken; his motion was overruled and exception was noted.

The witness further testified that the matter had never been discussed among the old stockholders of Universal directly or indirectly and the first time it was brought up for consideration was when Mr. Halle mentioned it at the above-described meeting, and that the matter had never been discussed with United or any of its officers. A similar motion was made by counsel for the respondent, was overruled and exception was noted.

After certain resolutions by the Board of Directors and [fol. 50] stockholders of Unopco had been adopted [on January 9, 1931, and January 10, 1931, respectively] the witness, along with officers of Unopco, discussed the matter and prepared a list of recipients and amounts to be paid to each. Among the recipients were Mr. Hall, a patent attorney, who had been attorney for Universal for some time; Mr. Mond, a local patent solicitor who had worked for Universal a number of years; Mr. Walker, an expert who had been called in from time to time in consultation and who had given testimony in cases relative to patent infringements; Mr. McAdams and Mr. Weber, also experts like Mr. Walker; Mr. Off, also an expert, who had not had anything to do with Universal in any way since approximately 1922; Mr. Murray, in the same general capacity as Mr. Off, who likewise had not done any work for Universal since about 1923; Mr. Sims, who had not been employed by Universal since 1924 or 1925; Mr. Pollock, a mechanical

engineer, and to some extent a chemical engineer, who had been employed during the development stage of the patented process and its apparatus, but who had ceased his connection with Universal in about 1922; Messrs. Bishop, Davis and Taylor, who had been employed in California in connection with certain operations connected with the early development of the process and had testified in an infringement suit in California [out of employment of Universal since about 1922, see Petitioner's Exhibit No. 3]; and Clara Prohaski, who was the sister of an employee of Universal who had helped in the installation and operation of the furnace unit installed by Universal at Wood River, Missouri. While operating that unit there was an explosion [fol. 51] and the employee was killed. Universal had paid his relatives certain money, "and then when this list was gotten up an additional $5,000 was paid to the sister of this young man."

The witness was present in Chicago when Mr. Halle gave out the first checks, and a large part of the checks. The selected employees of Universal were called in one by one and Mr. Halle told them in substance that the check was a gift from Unopco or the old stockholders of Universal as a mark of appreciation for their loyalty and that, it being a gift, the payment was tax free and they would not be required to make any income tax return on account of it. None of the recipients were stockholders, past or present, of Universal or of United, nor were any of them officers or directors, past or present, of Universal or United, nor were any of them stockholders, officers or directors, past or present, of Unopco. None of the recipients was present at the directors' or the stockholders' meetings of Unopco at which the resolutions directing payment were adopted. None of the recipients was instrumental in procuring the sale of the stock in Universal to United. There were no understandings or agreements between United and the vendors of Universal stock outside of the purchase agreement of January 2, 1931.

The witness further testified that in October, 1933, there was a meeting in New York of the representatives of the old stockholders of Universal and of United and of certain of the stockholders in United, witness representing old stockholders of Universal and present stockholders of Unopco. That meeting was called to discuss the income

tax matters of Universal covering the years approximately [fol. 52] 1923 to 1931, inclusive, which were then open before the Bureau of Internal Revenue. A tentative agreement had previously been arrived at with the Bureau. At the conference the question was raised whether or not Universal, in settling its tax liability with the Bureau could avail itself as a deduction of the aggregate payments that had been made in January, 1931, by Unopco to certain selected employees of Universal. It was agreed by all that no such deduction properly could be made, and none was ever made. On questions from the Member of the Board the witness testified that the so-called liquid assets of Universal were transferred to Unopco on January 5, 1931, before the sale of stock was consummated. The capital stock of Unopco was $100,000, the same amount as the capital stock of Universal. All the old stockholders of Universal received stock in Unopco; Mr. Frank L. Belknap and witness at the beginning of the enterprise in 1914 had a contract with Universal whereby they were to be paid 10% of its earnings. Mr. Belknap also had a small amount of stock. In distributing stock in Unopco, 10% thereof was distributed to the witness and Mr. Belknap in recognition of their rights and the balance was distributed to the old stockholders of Universal in the same proportion in which they had held stock in Universal.

On cross examination the witness testified that all of the recipients were or had been employed in one capacity or another by Universal, the lawyers and experts being under retainers in isolated instances. They had been paid for their services to Universal. Unopco was used for the [fol. 53] purpose of taking certain liquid assets out of Universal and being held by Unopco subject to the wishes of practically the same body of stockholders that had made up the stockholders of Universal. Monies which were distributed to the recipients came out of the liquid assets that were transferred from Universal to Unopco. The sale of the stock in Universal by the holders thereof was conditioned, among other things, upon these assets being taken out of Universal and put in Unopco. There were no other resolutions of the Board of Directors or stockholders of Unopco with respect to distributions of amounts to the recipients except those referred to in the stipulation of facts filed in this case and referred to above.

R. W. JEFFERSON, being first duly sworn, testified that he was a resident of Lakewood, Illinois, was a public accountant associated with the firm of Price, Waterhouse & Company in its Chicago office; that he had dealt with the tax-matters of Universal from about 1922 and was acquainted with the different transactions from 1922 through the year 1931 insofar as tax matters were concerned. Counsel for the respondent and counsel for the petitioner stipulated that Universal had sufficiently large income in the year 1930 so that if the full amount of the payments that were made in 1931 to the past and present employees, experts and attorneys of Universal had been deducted from the net taxable income of Universal for 1930 there still would have been an excess of income subject to taxation, and similarity for the year 1931.

[fol. 54] The witness then further testified that he was generally familiar with the income tax matters of the old stockholders of Universal and that they had made enormous profits as the result of the sale of their stock in Universal. Counsel for the respondent and counsel for the petitioner then stipulated that the old stockholders of Universal for 1930 and 1931 had income which was subject to tax and that if the amounts which were distributed to the petitioner and other recipients had been available to them for deduction in 1930 or 1931 it would have created a saving to them in respect to their income taxes for either of those years.

The witness further testified that he was familiar with the affairs of Unopco in 1931 and thereafter. The value of the assets turned over to Unopco by Universal under the purchase agreement of January 2, 1931, was about $4,100,000, and after the payments made to the petitioner and other recipients had been made Unopco had assets of a value of approximately $3,500,000.

The witness was not cross examined.

The respondent called no witnesses in rebuttal.

Thereupon counsel for both petitioner and respondent stated that they had no further or other evidence to present and rested their case.

The foregoing is the substance of all the evidence adduced at the trial of said proceeding.

Richard H. Wilmer, Douglas L. Hatch, Attorneys for the Petitioner. Herman Oliphant, Attorney for the Respondent.

[fol. 55] The foregoing contains the substance of all the evidence given on the hearing of this proceeding. This statement of the evidence is duly stated, approved, and signed, and ordered to be made of record, in the above-entitled cause this 16th day of Sept., 1936.

By the Board.

(S.) Eugene Black, Member.

BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

STIPULATION OF FACTS—Filed November 7, 1935

It is hereby stipulated and agreed by and between the parties hereto, by their respective attorneys, that the facts hereinafter set forth shall be taken as true, subject to any objections as to relevancy, and are the facts in this cause to be taken and considered by the Board of Tax Appeals the same to all intents and purposes as if the same facts had been proven and established by testimony on the trial [fol. 56] of said cause; provided, however, that this stipulation shall be without prejudice to the right of either party to introduce further and other evidence not inconsistent with the facts herein stipulated to be taken as true.

Universal Oil Products Company is a South Dakota corporation organized in 1914, and since its organization has been engaged in the business of developing and acquiring inventions for the treatment and refining of petroleum, and particularly the manufacture of gasoline therefrom, and obtaining and acquiring patents covering such inventions, and licensing the use of said inventions by others in consideration of the payment of royalties by such licensees to it for such use.

On January 6, 1931, all of the stockholders of Universal Oil Products Company, a South Dakota corporation, sold, delivered and transferred all of their stock in said Company to United Gasoline Corporation, a Delaware corporation, pursuant to and in accordance with a certain Purchase Agreement, a copy of which is hereto attached marked "Exhibit A" and made a part hereof;

None of said stockholders has been since said sale of his stock on January 6, 1931, a stockholder of said Universal Oil Products Company, or of said United Gasoline Cor-

poration, or has had, since said sale, any interest in the services rendered and to be rendered by any of the then or former employees, attorneys or experts of said Universal Oil Products Company, including petitioners, as employees, attorneys or experts of that Company, or otherwise, or in any other capacity;

[fol. 57] Prior to the sale, delivery and transfer of said stock on January 6, 1931, said Universal Oil Products Company had transferred and turned over to Unopco Corporation, a Delaware corporation, certain of the moneys and current assets of said Universal Oil Products Company; said Unopco Corporation never engaged in any business whatsoever prior to the time that said assets of said Universal Oil Products Company were transferred and turned over to it; since the transfer of said assets, Unopco Corporation has been engaged in the investment and reinvestment of said assets transferred to it by said Universal Oil Products Company; it never has engaged, and it was never intended that said Unopco Corporation should ever engage in the kind of business done by said Universal Oil Products Company.

Universal Oil Products Company continued in its business after the purchase of all of the stock of said Company by United Gasoline Corporation on January 6, 1931, and retained the greater part of its assets;

All of the stockholders of said Universal Oil Products Company who sold, delivered and transferred their stock on January 6, 1931, were from prior to January 6, 1931, and have continued to be and are now, stockholders of said Unopco Corporation in substantially the same proportions as their prior stockholdings in said Universal Oil Products Company;

After the sale, delivery and transfer of said stock on January 6, 1931, the former stockholders of said Universal Oil Products Company and the then stockholders of said Unopco Corporation, conferred together and concluded to [fol. 58] pay certain moneys to certain selected, then or former, employees, attorneys and experts of said Universal Oil Products Company;

Accordingly, a list of such employees, attorneys and experts was prepared, and thereupon, on January 9, 1931, at a meeting of the Board of Directors of said Unopco Corporation, a resolution was unanimously adopted, as follows:

"Resolved, that the Directors of this Corporation recommend to the stockholders of this Corporation that the sum of Six Hundred Seven Thousand Five Hundred Dollars ($607,500.) be appropriated, paid and distributed as a bonus to sixty-four (64) former and present employees, attorneys and experts of Universal Oil Products Company (the corporation of that name referred to in the meetings of this Corporation held on the fifth and sixth days of January, 1931), in recognition of the valuable and loyal services of said employees, attorneys and experts to said Universal Oil Products Company; such sum to be distributed among said sixty-four (64) employees, attorneys and experts in such amounts to each employee, attorney and expert as the Board of Directors of this Corporation shall determine; and that a special meeting of the stockholders of this Corporation be called to be held on Saturday, January 10, 1931, at the hour of 11:00 o'clock in the forenoon at the principal office of this corporation for the purpose of passing on this recommendation; and

"Resolved Further, that, subject to the approval of the [fol. 59] stockholders of this Corporation, this Corporation appropriate, pay and distribute as a bonus the said sum of Six Hundred Seven Thousand Five Hundred Dollars ($607,500.) to sixty-four (64) former and present employees, attorneys and experts of said Universal Oil Products Company in recognition of the valuable and loyal services of said employees, attorneys and experts, to said Universal Oil Products Company; such sum to be distributed among said sixty-four (64) employees, attorneys and experts in such amounts to each employee, attorney and expert as the Board of Directors of this Corporation shall determine."

Thereupon, on January 10, 1931, at a meeting attended by all of the stockholders of Unopco Corporation, the following resolution was unanimously adopted:

"Resolved, that the following recommendations made by the Board of Directors to the stockholders of this Corporation in the meeting of the Board of Directors held on January 9, 1931, viz.:

"That the sum of Six Hundred Seven Thousand Five Hundred Dollars ($607,500.) be appropriated, paid and distributed as a bonus to sixty-four (64) former and present

employees, attorneys and experts of Universal Oil Products Company (the corporation of that name referred to in the meeting of this Corporation held on the fifth and sixth days of January, 1931), in recognition of the valuable and loyal [fol. 60] services of said employees, attorneys and experts to said Universal Oil Products Company; such sum to be distributed among said sixty-four (64) employees, attorneys and experts in such amounts to each employee, attorney and expert as the Board of Directors of this corporation shall determine;

be and the same are hereby in all things approved; and

"Resolved Further, that this Corporation do appropriate, pay and distribute the said sum of Six Hundred Seven Thousand Five Hundred Dollars ($607,500.) as a bonus to sixty-four (64) former and present employees, attorneys and experts of said Universal Oil Products Company, in recognition of the valuable and loyal services of said employees, attorneys and experts to said Universal Oil Products Company; said sum to be distributed among said sixty-four (64) employees, attorneys and experts in such amounts to each employee, attorney and expert, as the Board of Directors of this Corporation shall determine."

Pursuant to and in accordance with said resolutions, the officers of said *Unopco Corporation* paid certain moneys, in the amounts determined by its Board of Directors, pursuant to said resolution of said stockholders, to certain of the then present and former employees, attorneys and experts of said Universal Oil Products Company designated by such Board of Directors; among the employees, attorneys and experts so paid, the following, the petitioners herein, [fol. 61] were, after January 10, 1931, and in January, 1931, paid the amounts set opposite their respective names, viz.:

Jacque C. Morrell	$25,000
Gustav Egloff	100,000
Lyman C. Huff	40,000
Edwin F. Nelson	10,000
Jean Delattre-Seguy	25,000
Bernard G. Lenske	5,000
James V. Willett	5,000
George A. Bockman	5,000
Maurice S. Beyt	5,000
Frank J. Mack	5,000

Macaulay Carter	10,000
E. M. Matson	5,000
Robert M. Kerr	40,000
William H. Walker	10,000
W. F. Hall	50,000
Neal S. Olsen	10,000
Donald J. Bergman	20,000
Arthur G. Bogardus	10,000

At no time prior to the sale of said stock of said Universal Oil Products Company on January 6, 1931, was the matter of making any money payments to any of the present and former employees, attorneys, or experts of said Universal Oil Products Company, in addition to the salaries, fees or compensation to which they were entitled under their employment contracts or retainers with said Universal Oil Products Company, discussed or considered by and between the stockholders of said Universal Oil Products Company, who sold all of their stock as aforesaid on January 6, 1931, [fol. 62] and said matter was never discussed or considered among said stockholders until after the consummation of said sale of said stock after January 6, 1931. The matter of making any such money payments was never discussed or considered at any time between any of the said employees, attorneys and experts of said Universal Oil Products Company and the officers, directors or stockholders of said Universal Oil Products Company. The first notice or knowledge that any of the said employees, attorneys or experts of said Universal Oil Products, including the employees, attorneys and experts referred to in the said resolutions of the Board of Directors and stockholders of said Unopco Corporation, hereinbefore set forth, had of any purpose or intention on the part of said Unopco Corporation and of its stockholders to make any such money payments, was after said resolutions had been passed. Said monies were voted to be paid and were paid under and by virtue of said resolutions and were paid without any agreement or understanding, expressed or implied, between any of said employees, attorneys or experts referred to in said resolutions, including petitioners, and said Universal Oil Products Company or any of its officers or directors or stockholders, or said Unopco Corporation or any of its officers, directors or stockholders, and without any requests therefor by any of said employees, attorneys or experts, but as hereinbefore stated

said payments were made at the sole instance of said Unopco Corporation and of its stockholders.

None of said employees, attorneys and experts referred to in said resolutions, including petitioners, to whom said [fol. 63] moneys were paid pursuant to and in accordance with said resolutions, hereinabove set forth, was ever in the employ of said Unopco Corporation, or of any of its stockholders, or of any of the former stockholders of said Universal Oil Products Company who sold their stock to said United Gasoline Corporation, as hereinbefore stated, or ever rendered any services to said Unopco Corporation or to any of its stockholders, and it was never agreed, understood or intended by anyone that any of them should or would ever render any such services at any time in the future.

None of the moneys so paid to any of said employees, attorneys or experts, including petitioners, was paid to any of them in payment for or in consideration of any services rendered or ever to be rendered, or of any consideration of any kind or character paid or given, or ever to be paid or given by any of said employees, attorneys or experts, including petitioners, to said Unopco Corporation.

Each and all of said employees, attorneys and experts, including petitioners, were prior to the payment of said moneys, employed or retained by said Universal Oil Products Company under agreements or contracts of employment or retainers; each and all of said employees, attorneys and experts, including petitioners had been paid by said Universal Oil Products Company, according to said agreements or contracts of employment or retainers, all the salary and compensation due them from said Universal Oil Products Company for the services rendered by them to said Universal Oil Products Company, prior and up to the time said payments were authorized by the Board of Directors [fol. 64] and stockholders of said Unopco Corporation and were made; neither said Universal Oil Products Company nor said United Gasoline Corporation was under any legal or other obligation to pay said employees, attorneys and experts, including petitioners, any additional salary or compensation other than the salary and compensation to which they were entitled and were paid by said Universal Oil Products Company under and by virtue of their said agreements or contracts of employment or retainers, or to pay to any of said employees, attorneys and experts, including

petitioners, any of said moneys paid to them by said Unopco Corporation, as hereinabove stated and set forth, and none of said employees, attorneys or experts, including petitioners, has ever asserted any such claim or has any intention of asserting any such claim against any of said companies.

Neither said Unopco Corporation nor any of its stockholders, nor any of the stockholders of Universal Oil Products Company, was at any time under any legal or other obligation to pay any of said employees, attorneys or experts, including petitioners, any salary, compensation or consideration of any kind. None of said employees, attorneys or experts, including petitioners, has ever asserted any claim or had any intention of asserting any claim against said Unopco Corporation, or against any of its stockholders, or against any of said former stockholders of said Universal Oil Products, for any salary, compensation or consideration for any services, or for anything else.

Each and all of the payments made to said employees, at- [fol. 65] torneys and experts of Universal Oil Products Company, including petitioners, pursuant to said resolutions of the Board of Directors and Stockholders of Unopco Corporation, were made by Unopco Corporation, at the instance of its stockholders, and without any legal or other obligation on the part of said Unopco Corporation or its stockholders to make said payments, in whole or in part, and none of said payments were made pursuant to or in fulfillment of any agreement of understanding, express or implied, with said employees, attorneys and experts, that any of said payments, or any part thereof, should or would be made; said payments were not made or intended to be made by said Unopco Corporation or any of its stockholders as payment or compensation for any services rendered or to be rendered or for any consideration given or to be given by any of said employees, attorneys or experts to said Unopco Corporation or to any of its stockholders. All of the recipients of said moneys, including petitioners, either were employees, attorneys or experts of said Universal Oil Products Company at the time of the payment of said moneys or had been prior thereto.

H. J. Halle, the President of Unopco Corporation, personally distributed said moneys to the petitioners and to other employees, attorneys and experts referred to in said

resolutions of the Board of Directors and of the stockholders of said Unopco Corporation, hereinabove set forth, either by personally delivering the checks of said Unopco Corporation for the moneys paid to each, or by transmitting and delivering said checks by mail, through the United States mail, accompanied by letters of said H. J. Halle to [fol. 66] such employees, attorneys and experts; in each instance where the checks were delivered in person, as aforesaid, said H. J. Halle stated to each of the recipients, as and when he delivered said checks to them, that the moneys represented by said checks were given to them and each of them, by said Unopco Corporation, at the instance of the stockholders of said Unopco Corporation, as a gift and gratuity, and were therefore not subject to income tax on the part of such recipients; in the instances where the checks were delivered by mail, they were accompanied by letters of H. J. Halle, as aforesaid, and he stated in said letters that the moneys represented by said checks were given as gifts and gratuities by said Unopco Corporation at the instance of its stockholders, and that because and in consequence thereof, they were income tax free, and not accountable on the part of such recipient in his income tax return; the copies of the letters hereto attached, marked Exhibits "B," "C," "D," "E," "F," "G," "H," "I," "J" and "K" are correct copies and examples of said letters sent by mail, as aforesaid.

Each and all of said employees, attorneys and experts who received and accepted said checks, and the moneys represented thereby, including each and all of the petitioners, received and accepted said moneys and were informed by said H. J. Halle that the same were gifts and gratuities.

Neither said Unopco Corporation nor said Universal Oil Products Company nor said United Gasoline Corporation, nor any of the stockholders of any of said companies, ever made or claimed any deduction whatsoever for Federal [fol. 67] Income Tax purposes because and on account of the payment of any of the moneys paid to said employees, attorneys and experts, including petitioners, pursuant to said resolutions of the Board of Directors and stockholders of said Unopco Corporation, but said Unopco Corporation in January, 1931, charged all of the moneys so paid to Surplus Account on the books of that Company; each and all of said employees, attorneys and experts, including each and

all of the petitioners, treated the payment of said moneys as gifts and gratuities and therefore income tax free, and accordingly none of them made any income tax return on account of the receipt of said moneys.

Richard H. Wilmer, R. G. Sutherland, Merlin A. Muth, Attorneys for Petitioners. Robert H. Jackson, Attorney for Respondents.

EXHIBIT "B" TO STIPULATION

Copy

New York, January 22, 1931.

Jean Delattre-Seguy, Esq., 2141 Wyoming Ave., Washington, D. C.

DEAR JEAN:

Here is the slice of bacon which the old stockholders of [fol. 68] Universal want you to have as a gift from them, and which was saved for you out of the party given on January 6 at Chicago. You need not account for this in your income tax return, as gifts are free from tax.

May I suggest, and in doing so reflect the strong opinion of all my associates, that this fund ought to be put aside by you, and invested in the safest securities, preferably municipal bonds as a nest egg to build on. If you agree, suggest you return it with your endorsement, and with any instructions that you may have to give.

Please do not make mention to anyone of the amount of this check. We are making a limited number of distributions in varying amounts, and therefore prefer that you neither ask others nor tell anyone what you got.

With all good wishes.

Yours very truly —— ——.

HJH:er.
Enclosure.

EXHIBIT "C" TO STIPULATION

Copy

New York, January 20, 1931.

Dr. Victor Henny, Universal Oil Products Company Representative, Bush House, Aldwych, London, W. C: 2, England.

DEAR DR. HENNY:

The enclosed check is sent you on behalf of all of the old [fol. 69] stockholders of Universal as a gift to you in appreciation of the relationship which has existed, and because you were considered one of the family this piece of cake has been saved for you from the party we gave here January 6.

May I suggest in your interest, in view of the tax situation, that you return this check with your endorsement and such instructions as you may have to give either for its deposit or for conversion into securities. If the latter, would suggest municipal bonds, which are tax free in the United States, yielding four per cent. or a shade better. This is the security in which I am personally investing, likewise Mrs. Armour and others with a view mainly to safety of principal, and with little or no regard for speculative values.

It will be a comfort for us to know that you look on this fund in the same light in your own behalf and on behalf of your family, but with the understanding that you are free to do with it as you please.

Please make no mention of the amount of this check to anyone other than to any of our stockholders from whom it is derived.

With all good wishes,

Yours very truly, —— ——.

HJH:er.
Enclosure.

cc. HJH RJD AFR FLB JJM.

[fol. 70] EXHIBIT "D" TO STIPULATION

Copy

New York, January 20, 1931.

Dr. V. Henny, Universal Oil Products Co. Representative, Bush House, Aldwych, London, W. C. 2, England.

DEAR DR. HENNY:

We are sending Wilcox' check for Twenty-five Hundred Dollars, and Alberding one of same amount, and likewise to Edeleanu at Bucharest, all of which we are happy to do. We want you to know about this.

HJH:er.
Enclosure.

cc.HJH RJD AFR FLB JJM.

EXHIBIT "E" TO STIPULATION

Copy

New York, January 20, 1931.

Mr. J. M. Wilcox, % Dr. V. Henny, Representative, Universal Oil Products Company, Bush House, Aldwych, London, W. C. 2, England.

DEAR MR. WILCOX:

As an evidence of our appreciation, and in the desire to have you know that you are considered one of the family, [fol. 71] the old stockholders of Universal send you the enclosed check as evidence of the fact that you were not forgotten when the party was given here January 6, even though you were not present.

It is purely a gift, and need not therefore be accounted as income. If you wish for tax purposes that these funds be kept here, please endorse the check and return with your instructions either for deposit or for investment in municipal bonds or any other similar and absolutely safe security,

but without any restrictions on you to do do with it as you please.

Yours very truly, —— ——.

HJH:er.
Enclosure.

CC.HJH RJD AFR FLB JJM.

EXHIBIT "F" TO STIPULATION

Copy

New York, January 20, 1931.

Mr. C. H. Alberding, % Dr. V. Henny, Bush House, Aldwych, London, W. C. 2, England.

DEAR ALBERDING:

You know what happened here on January 6, so will not go into details.

[fol. 72] Want you to know, however, that as a member of the family you are to participate in the event to the extent of the enclosed check which is a gift to you on behalf of all the old stockholders.

If for tax reasons you prefer to have these funds here in the United States, or invested, say, in municipal bonds or in any other manner, please endorse the check and return it with your instructions.

Your very truly, —— ——.

HJH:er.
Enclosure.

cc. HJH RJD AFR FLB JJM.

EXHIBIT "G" TO STIPULATION

Copy

New York, January 20, 1931.

William Fairfax Hall, Esq., Victor Building, Washington, D. C.

DEAR MR. HALL:

It is with more than usual pleasure that I send you herewith, at the request of and on behalf of all the old stock-

holders, a check to your order for Fifty Thousand Dollars. This is a gift purely personal for you, and is not to be considered a partnership or corporation matter by you, [fol. 73] and is consequently also not subject to income tax by you.

This is your piece of cake from the party we held in Chicago on January 6, in recognition and appreciation of our association throughout the years. We prefer that no mention be made by you of the amount of this check to others than the stockholders from whom it comes.

We were most happy indeed, as you can well appreciate, to receive the decision of Judge Runyon, and at a most dramatic moment. It came within an hour of the exchange of papers, and the effect was quite startling on those adversely affected.

Yours very truly, —— ——.

HJH:er.

cc. RJD FLB JJM AFR HJH.

EXHIBIT "H" TO STIPULATION

Copy

New York, January 20, 1931.

Mr. W. R. Howard, 95 Rust Building, Washington, D. C.

DEAR BILL:

Sorry I could not see you while in Chicago, but I was unduly rushed for the past two weeks, as you know. [fol. 74] We saved a little piece of cake for you from the party we had on January 6, and am happy to enclose herewith check to your order, which is a gift from all the stockholders. Inasmuch as this is purely a gift, you need not account for it in your federal income tax report.

With all good wishes and kind regards,

Yours very truly, —— ——.

HJH:er.
Enclosure.

cc. RHD FLB JJM AFR HJH.

EXHIBIT "I" TO STIPULATION

Copy

New York, January 20, 1931.

Professor William H. McAdams, 14 Netherlands Road, Brookline, Massachusetts.

DEAR PROFESSOR MCADAMS:

I am very happy to send you herewith check for One Thousand Dollars, which is purely a gift from the old stockholders of Universal in appreciation of the pleasant relationship which has existed, and your enthusiastic support, and made possible by the affair that occurred in Chicago January 6.

With all good wishes and kind regards,

Yours very truly, —— ——.

HJH:er.

cc. HJH RJD FLB JJM AFR.

[fol. 75] EXHIBIT "J" TO STIPULATION

Copy

New York, January 20, 1931.

Professor Harold C. Weber, 160 Brook Road, Milton, Massachusetts.

DEAR PROFESSOR WEBER:

The enclosed check for One Thousand Dollars is sent you at the request of and on behalf of all the old stockholders of Universal, purely as a gift, and so that you might also participate in the affair which took place in Chicago on January 6.

With all good wishes and personal regards,

Yours very truly, —— ——.

HJH:er.
Enclosure.

cc. HJH RJD FLB JJM AFR.

EXHIBIT "K" TO STIPULATION

Copy

New York, January 20, 1931.

Mr. Will F. Sims, Care Panhandle Refining Company, Panhandle Building, P. O. Box 1107, Wichita Falls, Texas.

DEAR MR. SIMS:

No doubt you have read reports of what occurred in the affairs of the Company at Chicago on January 6. We [fol. 76] thought of you at that time, and your old association with us, your enthusiastic and helpful support, and as a result, on behalf of all the old stockholders, am sending you herewith check to your order for Five Thousand Dollars, for we considered you one of the family in the old days. I hope throughout the years you will continue to feel that you are still a member of the family.

This is purely a gift, and therefore you need not account for it to the Government in your income tax.

I shall continue with the new Company in the same relationship. This is at the request of all concerned, though I would have been glad to be relieved of the continuing responsibility, happy as I have been through the years, in the progress that has been made, to which you contributed in the early days, and I hope to be as happy in the new associations.

With all good wishes to you and your family for your health and happiness,

Yours very truly, —— ——.

HJH:er.
Enclosure.

cc. HJH RJD FLB AFR JJM.

[fol. 77] PETITIONER'S EXHIBIT 1

Employees of Universal Oil Products Company Year 1930	Salary per Yr. 1930	Bonus Paid by Universal Oil Products Company, Year 1930	Monies Paid by Unopco Corporation January 1931
J. G. Alther	$18,000.00	$6,000.00	$
R. J. Dunham, Jr.	5,310.00	1,000.00	
J. Delattre-Seguy	9,600.00	5,400.00	25,000.00
N. S. Olsen	6,000.00	1,000.00	10,000.00
R. M. Kerr	4,800.00	2,000.00	40,000.00
N. H. McAdams	1,800.00	1,000.00	
H. C. Weber	1,200.00	1,000.00	
W. R. Howard	3,600.00	100.00	2,500.00
J. B. Heid	4,200.00	800.00	
Gustaf Egloff	14,400.00	5,600.00	100,000.00
—. F. Faragher	9,000.00	6,000.00	10,000.00
Robert Pyzel	7,200.00	1,800.00	10,000.00
Otto Behimer	15,000.00	5,300.00	
M. S. Beyt	4,800.00	600.00	5,000.00
Geo. B. Murphy	5,000.00	1,200.00	
Victor Henny	15,000.00	5,000.00	50,000.00
Ion Edeleanu	4,090.80	1,000.00	2,500.00
Joachim Hausman	1,227.24	200.00	
A. G. Bogardus	6,000.00	2,000.00	10,000.00
Macauley Carter	6,000.00	1,000.00	10,000.00
W. M. Drown, Jr.	3,600.00	600.00	
G. W. Miller	5,400.00	750.00	5,000.00
N. G. dePachat	4,800.00	600.00	
J. C. Morrell	10,800.00	2,200.00	25,000.00
B. G. Lenske	5,400.00	1,200.00	5,000.00
Jessie Baxter	3,000.00	600.00	2,500.00
George Bockman	5,100.00	600.00	5,000.00
J. Conviser	4,500.00	500.00	5,000.00
L. C. Huff	13,200.00	3,600.00	40,000.00
D. J. Bergman	8,400.00	1,000.00	20,000.00
—. V. Willett	5,700.00	1,000.00	5,000.00
S. R. Wilson	9,000.00	1,800.00	10,000.00
F. J. Mack	7,500.00	1,000.00	5,000.00
H. W. Bieze	4,500.00	500.00	
F. J. Ritz	4,200.00	500.00	1,000.00
R. E. Nagel	6,000.00	750.00	5,000.00
H. P. Benner	9,000.00	2,500.00	15,000.00
G. H. Alberding	7,200.00	1,500.00	2,500.00
S. L. Holt	4,500.00	750.00	
Fay E. Stewart	5,400.00	750.00	2,500.00
W. F. Vineyard	4,800.00	1,000.00	2,500.00
R. D. Williams	3,900.00	500.00	
E. M. Matson	5,400.00	750.00	5,000.00
J. S. Miller	6,600.00	1,200.00	5,000.00
Edwin F. Nelson	5,400.00	1,000.00	10,000.00

PETITIONER'S EXHIBIT 1—Continued

Employees of Universal Oil Products Company Year 1930	Salary per Yr. 1930	Bonus Paid by Universal Oil Products Company, Year 1930	Monies Paid by Unopco Corporation January 1931
Ida Redlefsen	1,912.50	300.00	1,000.00
L. M. Healy	1,776.14	300.00	
W. R. Kinnaird	4,800.00	600.00	2,500.00
W. H. Jones	5,113.50	511.35	
B. H. Davies	2,629.80	262.98	
J. R. Lowery	1,982.09	198.21	
A. E. Whyman	1,753.20	175.32	
B. S. Brailey	2,337.60	233.76	
W. G. Gross	2,337.60	233.76	
F. L. Sager	2,922.00	292.20	
M. D. Gilchrist	3,303.12	330.31	
W. Duff	2,629.80	262.98	
N. G. Kosloff	1,266.20	126.62	
Ellen J. E. Neate	1,772.68	177.27	
Edith R. Fisk	1,266.20	126.62	
Ruby G. Wortman	1,076.27	107.63	
Frances W. Stannard	886.34	88.63	
Doris M. Brown	759.72	75.97	
Muriel E. Brown	430.10	43.01	
Muriel M. Russell	684.24	68.42	
W. H. Andrau	2,400.00	240.00	
F. L. Burr	80.35	8.04	
[fol. 78]			
R. F. Davis	4,800.00	480.00	
C. H. Angell	3,600.00	360.00	1,000.00
G. T. Tobiasson	3,600.00	360.00	1,000.00
Mayme Forsland	1,440.00	144.00	
Mabel Nutting	877.33	87.73	
Louise Harlan	1,620.00	162.00	
Pearl Wilson	1,560.00	156.00	
F. W. Leffer	2,550.00	255.00	
Dr. Leopold Singer	5,000.00	500.00	
Paul Truesdell	15,000.00	1,500.00	
E. V. Pherigo	1,129.33	112.93	
Lydia Fredericks	2,100.00	210.00	
Estelle Robbins	1,322.42	132.24	
Ethel Soilky	1,740.00	174.00	
Arline Hartl	332.09	33.21	
E. W. Whitcombe	4,200.00	420.00	2,500.00
A. W. Lindahl	3,600.00	360 00	
M. L. Overstreet	4,200.00	420.00	
P. J. Mueller	2,880.00	288.00	
S. G. Heath	2,700.00	270.00	
J. G. McCarte	2,220.00	222.00	
W. J. Ireland	1,620.00	162.00	
Jeannette Bates	2,100.00	210.00	
Leola Glass	1,680.00	168.00	
Esther Lockwood	1,680.00	168.0–	

PETITIONER'S EXHIBIT 1—Continued

Employees of Universal Oil Products Company Year 1930	Salary per Yr. 1930	Bonus Paid by Universal Oil Products Company, Year 1930	Monies Paid by Unopco Corporation January 1931
J. R. McGowan	2,700.00	270.0–	
L. M. Newton	2,700.00	270.0–	
H. Anderson	2,985.48	298.5–	
H. A. Becker	2,340.00	234.00	
S. I. Bloomquist	536.67	353.67	
C. E. Bodin	417.74	41.77	
R. H. Brandt	4,200.00	420.00	
O. A. Byrk	2,386.67	238.67	
F. J. Carlin	2,100.00	210.00	
L. W. Chatroop	2,400.00	240.00	
H. Cressey	2,100.00	210.00	
J. J. Daley	2,220.00	222.00	
W. W. Dee	1,920.00	192.00	
—. M. Dziadul	741.00	74.10	
E. G. Goransson	2,059.17	205.92	
F. A. Groth	371.62	37.16	
D. S. Graham	495.16	39.52	
R. F. Gray	2,400.00	240.00	
M. Greenwald	1,080.00	108.00	
Irving Hasse	1,080.00	108.00	
J. J. Heifler	2,100.00	210.00	
W. W. Heinze	2,220.00	222.00	
Walter Hensel	2,700.00	270.00	
H. H. Hultman	3,000.00	300.00	
C. Jaguske	2,820.00	282.00	
W. A. Jenrich	2,220.00	222.00	
R. H. Karl	2,100.00	210.00	
C. W. Kerner	3,120.00	312.00	
B. L. Kramer	2,160.00	216.00	
C. W. Langefeld	2,280.00	228.00	
W. B. Leyerle	2,220.00	222.00	
A. W. Lokke	2,100.00	210.00	
E. B. Lund	2,160.00	216.00	
J. Maras	358.06	35.81	
C. Maratos	2,820.00	282.00	
B. May——	2,220.00	222.00	
S. T. McDermott	3,180.00	318.00	
S. S. Miller	400.81	40.08	
R. T. Moore	2,820.00	282.00	
W. L. Morgan	2,400.00	240.00	
L. J. Nelson	2,220.00	222.00	
D. J. Niotis	525.00	52.50	
J. P. Odegaard	536.67	53.67	
A. C. Proctor	3,000.00	300.00	
A. C. Rasmussen	2,700.00	270.00	
J. H. Riley	1,002.17	100.22	
P. H. Roaller	530.67	53.67	
A. Saether	560.00	56.00	

PETITIONER'S EXHIBIT 1—Continued

Employees of Universal Oil Products Company Year 1930	Salary per Yr. 1930	Bonus Paid by Universal Oil Products Company, Year 1930	Monies Paid by Unopco Corporation January 1931
[fol. 79]			
John B. Barnes	$1,500.00	$150.00	
Randi Andersen	1,750.00	175.00	
Felix Skowronski	5,400.00	540.00	
W. G. Mayo	3,600.00	360.00	
Arthur Conolly	1,250.00	125.00	
A. P. Van Headen	3,300.00	330.00	
R. E. Whitlock	2,175.00	217.50	
W. McCaffrey	1,750.00	175.00	
K. Swartwood	2,340.00	234.00	
A. Engelstein	2,190.00	219.00	
Florence E. Tidmarsh	2,130.00	213.00	
Mary Frawley	1,260.00	126.00	
Viven Fleet	330.00	33.00	
Virginia M. Hawkins	435.48	43.54	
Harold A. Jefferson	517.83	51.78	
Harold Enwright	361.70	36.17	
Harry Weaver	1,200.00	120.00	
Soule S. Weems	833.33	83.33	
Gertrude Hess	1,050.00	105.00	
W. J. Gudkov	4,000.00	400.00	
Rosamond A. Mix	1,963.38	196.34	
Ethelynn Marsh	1,800.00	180.00	
Gladys Riddle	1,458.33	145.83	
C. Batey	1,680.00	168.00	
B. A. Christ	1,860.00	186.00	
O. E. Cihlar	1,800.00	180.00	
Willard Hess	2,040.00	204.00	
C. A. Lockwood	3,000.00	300.00	
D. M. Owen	1,680.00	168.00	
A. A. Reynolds	2,640.00	264.00	
—. W. Schenk	1,500.00	150.00	
L. Widegren	1,020.00	102.00	
C. G. Wrege	3,000.00	300.00	
Cornell Allness	1,268.67	126.87	
Dorothy Hepworth	1,500.00	150.00	
Ruth Kvidera	1,489.92	148.99	
Evelyn O'Brien	1,920.00	192.00	
Lois A. Starkey	1,049.90	104.99	
Alice Vopicka	945.00	94.50	
J. C. Parmely	6,780.00	678.00	5,000.00
A. J. Argraves	3,720.00	372.00	
M. W. Barnes	2,400.00	240.00	
J. C. Dasso	2,820.00	282.00	
J. W. Davis	2,520.00	252.00	
I. S. Dobbs	2,220.00	222.00	
O. H. Fairchild	3,900.00	390.00	5,000.00

PETITIONER'S EXHIBIT 1—Continued

Employees of Universal Oil Products Company Year 1930	Salary per Yr. 1930	Bonus Paid by Universal Oil Products Company, Year 1930	Monies Paid by Unopco Corporation January 1931
B. H. Hawkins	4,080.00	408.00	1,000.00
H. F. Huff	4,800.00	480.00	5,000.00
W. E. Hulsberg	2,940.00	294.00	
E. C. Leonhardy	3,000.00	300.00	
P. Mather	5,090.00	509.00	
L. A. Mekler	6,000.00	600.00	2,500.00
E. T. Steele	3,900.00	390.00	1,000.00
E. L. Stewart	3,600.00	360.00	1,000.00
C. L. Wedell	2,700.00	270.00	
Edith Anderson	1,920.00	192.00	
Nellie Gilmore	1,668.71	166.87	
Gladys Hague	1,590.00	159.00	
Sarah Kramer	1,800.00	180.00	
L. M. Langley	2,051.37	205.14	
J. P. Lucas	1,338.78	133.88	
Cecelia Maley	1,725.00	172.50	
A. H. Yetter	2,000.00	200.00	1,000.00
Badona L. Levinson	554.17	55.42	
Winifred M. Bridges	933.33	93.33	
[fol. 80]			
A. Savitsky	1,352.94	135.29	
H. Schumacher	1,380.00	138.00	
J. Shimek	2,047.50	204.75	
A. M. Shoresman	516.53	51.65	
J. E. Stanger	429.03	42.90	
A. G. Wagner	2,100.00	210.00	
I. I. Waller	417.74	41.77	
J. B. Webb	2,760.00	276.00	
H. D. Willmers	2,160.00	216.00	
T. G. Valinda	395.16	39.52	
W. M. Labastille	378.23	37.82	
R. C. Rathbun	378.23	37.82	
B. V. Weinper	378.23	37.82	
A. E. Wasencraft	373.33	37.33	
P. Nordstad	387.90	38.79	
C. J. Heine	256.67	25.67	
R. Nelson	256.67	25.67	
G. W. Beddall	3,600.00	360.00	
R. B. Hopkins	2,200.00	220.00	
W. H. Minkema	4,500.00	450.00	
G. E. Shelton	4,200.00	420.00	
E. B. Sherwood	3,750.00	375.00	
F. W. Taylor	3,900.00	390.00	
L. Wenzer	3,600.00	360.00	
W. R. Dial	1,620.00	162.00	
O. N. Miller	5,100.00	510.00	
J. M. Wilcox	5,600.00	560.00	2,500.00

PETITIONER'S EXHIBIT 1—Continued

Employees of Universal Oil Products Company Year 1930	Salary per Yr. 1930	Bonus Paid by Universal Oil Products Company, Year 1930	Monies Paid by Unopco Corporation January 1931
F. F. Carter	3,600.00	360.00	
R. G. Juhre	3,600.00	360.00	
H. P. Andrews	3,300.00	330.00	
J. Beddow	1,400.00	140.00	
—. R. Kanhofer	3,000.00	300.00	
E. A. Goff	4,200.00	420.00	
B. F. McAlester	3,900.00	390.00	
E. C. Beach	3,600.00	360.00	
F. B. Carver	3,600.00	360.00	
J. C. Green	3,300.00	330.00	
W. A. Keightley	3,300.00	330.00	
R. A. Cordt	1,260.00	126.00	
Bernice Hague	141.92	14.19	
B. W. Morgan	5,100.00	510.00	1,500.00
L. O. McNally	5,100.00	510.00	1,000.00
Emma E. Crandal	2,700.00	270.00	
Evelyn Laatz	1,440.00	144.00	
G. P. Boon	2,280.00	228.00	
R. C. Benson	1,980.00	198.00	
H. G. Vincent	1,920.00	192.00	
F. J. Gervais	3,480.00	348.00	
W. Boss	2,340.00	234.00	
H. O. Munn	2,700.00	270.00	
H. Rodman	2,040.00	204.00	
C. Uhlich	1,884.00	188.40	
G. F. White	1,980.00	198.00	
E. L. Miller	1,920.00	192.00	
G. Maronic	2,160.00	216.00	
S. Susich	1,740.00	174.00	
W. Klobuchar	1,920.00	192.00	
F. Kruzich	1,680.00	168.00	
F. Rachik	1,680.00	168.00	
J. Kosmerl	1,320.00	132.00	
S. Wilson	1,320.00	132.00	
W. J. Evans	660.00	66.00	
M. Peters	1,878.16	187.82	
E. Pavlis	1,560.00	156.00	
F. Wisek	1,560.00	156.00	
T. Mance	1,560.00	156.00	
[fol. 81]			
T. P. Rowley	1,360.00	136.00	
C. B. Layton	2,460.00	246.00	
E. Brown	916.29	91.63	
C. Rohlfing	2,520.00	252.00	
W. F. Brown	2,580.00	258.00	
C. H. Davis	2,280.00	228.00	
E. Sondregger	2,280.00	228.00	
W. F. Morris	2,280.00	228.00	
A. Bacastow	2,280.00	228.00	

PETITIONER'S EXHIBIT 1—Continued

Employees of Universal Oil Products Company Year 1930	Salary per Yr. 1930	Bonus Paid by Universal Oil Products Company, Year 1930	Monies Paid by Unopco Corporation January 1931
R. Gasaway	$2,100.00	$210.00	
G. Royse	2,100.00	210.00	
B. H. Sellen	2,160.00	216.00	
R. K. Jones	2,400.00	240.00	
E. Chambers	1,429.28	142.93	
A. Gatz	2,040.00	204.00	
B. C. Powell	1,980.00	198.00	
R. Murray	1,980.00	198.00	
W. Creger	1,925.00	192.50	
F. W. Reardon	1,980.00	198.00	
W. E. Turvey	1,980.00	198.00	
C. E. Johnson	1,980.00	198.00	
W. G. Evans	2,040.00	204.00	
H. E. Raguse	1,358.83	135.88	
L. Huffman	1,718.58	171.86	
R. Gabbert	1,329.55	132.95	
L. Allen	1,090.70	109.07	
G. Sondregger	1,058.95	105.90	
W. Frandsen	1,064.15	106.42	
E. Seigwart	1,058.95	105.90	
P. Cunningham	1,391.10	139.11	
Wm. Vickery	1,102.50	110.25	
—. W. Kelly	2,100.00	210.00	
W. H. Besselman	1,366.67	136.67	1,000.00
B. J. Flock	2,880.00	288.00	
B. D. Wells	2,100.00	210.00	
E. H. McGrew	2,580.00	258.00	
J. B. White, Jr	2,700.00	270.00	
C. G. Gerhold	2,100.00	210.00	
Charles Wirth III	3,000.00	300.00	
M. C. Sumpter	1,983.37	198.34	
W. B. Shanley	1,340.00	134.00	
R. A. Weppner	1,340.00	134.00	
R. C. Wackher	960.00	96.00	
C. G. Dryer	1,132.26	113.23	
W. K. Simpson	530.00	53.00	
V. Mekler	3,450.00	345.00	
W. H. Hubner	3,600.00	360.00	
C. Larsen	1,800.00	180.00	
A. R. Jensen	1,800.00	180.00	
O. I. Lewis	921.10	92.11	
Marie B. Lewins	1,920.00	192.00	
Elvira Raguse	1,440.00	144.00	
De Elda Ridley	509.52	50.95	
Rose Antolich	1,200.00	120.00	
Berna Deanne Feely	1,200.00	120.00	
Edith Mellbom	1,080.00	108.00	
Eleanor Ross	990.00	99.00	
Alice Bokholdt	969.35	96.94	
Vlasta Jurack	413.71	41.37	

PETITIONER'S EXHIBIT 1—Continued

Employees of Universal Oil Products Company Year 1930	Salary per Yr. 1930	Bonus Paid by Universal Oil Products Company, Year 1930	Monies Paid by Unopco Corporation January 1931
Florence Dusky	1,080.00	108.00	
Ethel Hitchcock	509.52	50.95	
J. L. Essex	5,100.00	510.00	
C. D. Lowry, Jr.	5,000.00	500.00	
I. Levine	3,300.00	330.00	
S. Comay	3,480.00	348.00	
R. Schaad	3,000.00	300.00	
G. S. Monroe	3,480.00	348.00	
H. T. Bollman	795.00	79.50	
A. L. Jackson	2,400.00	240.00	
A. H. Walbaum	2,100.00	210.00	
[fol. 82]			
W. C. Shand	2,100.00	210.00	
R. W. Moehl	2,100.00	210.00	
J. R. Strong	2,100.00	210.00	
F. B. Behrens	2,100.00	210.00	
W. L. Benedict	2,100.00	210.00	
F. J. Vitovec, Jr.	2,100.00	210.00	
M. A. Smith	1,800.00	180.00	
R. Castanien	1,800.00	180.00	
E. A. Luchterhand	1,407.58	140.76	
W. B. Borst	1,335.00	133.50	
M. J. Stross	1,575.00	157.50	
H. Pines	1,258.87	125.89	
F. M. Keller	1,230.00	123.00	
J. J. Jeans	1,680.00	168.00	
A. F. Millard	1,262.45	126.25	
F. Mastelick	737.00	73.70	
J. Kruzich	890.45	89.05	
W. D. Leighton	1,800.00	180.00	
M. W. Cox	1,620.00	162.00	
G. A. Erickson	1,492.50	149.25	
H. Hoover	1,090.53	109.05	
W. G. Shields	806.80	80.68	
J. Grutka	860.10	86.01	
E. L. Kidwell	564.30	56.43	
—. K. Majich	1,893.00	189.30	
M. Strukel	1,674.40	167.44	
A. C. England	1,799.32	179.93	
B. Strutzenberg	1,650.03	165.00	
A. L. Seneca	1,323.40	132.34	
W. Nimmo	502.78	50.28	
Elmer Morris	1,036.05	103.61	
E. E. Falb	1,467.74	146.77	
S. L. Priestman	1,635.16	163.52	
J. T. Vesely	296.29	29.63	
A. Hasse	59.76	5.98	
		$144,450.02	

[fol. 83] PETITIONER'S EXHIBIT 2

Year	Total Payroll Universal Oil Products Co.	Bonus Universal Oil Products Co.
1925	$397,483.16	$43,917.92
1926	612,737.78	67,967.15
1927	748,733.46	81,775.00
1928	782,136.26	103,544.55
1929	1,104,788.85	136,383.55
1930	1,169,947.08	144,450.02

[fol. 84] PETITIONER'S EXHIBIT 3

		Monies Paid by Unopco Corporation January, 1931
William Fairfax Hall	Attorney	$50,000
Charles M. Thomas	Attorney	32,500
Albert L. Mond	Attorney	15,000
William H. Walker	Expert	10,000
William H. McAdams	Expert	1,000
H. C. Weber	Expert	1,000
Charles Off	Expert (About 1922)	8,500
R. L. Nurray	Out of employ since about 1923	1,000
Willis Sims	" " " " " 1924-25	5,000
Robert T. Pollock	" " " " " 1922	5,000
J. L. Bishop	" " " " " 1922	500
Barney Davis	" " " " " 1922	500
F. H. Taylor	" " " " " 1922	500
Clara Prohaski	(Sister of a former employee, who was killed at Wood River, Illinois, while working on a Universal experimental Unit about 1919.)	5,000

[fol. 85] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

ORDER FOR TRANSMISSION OF EXHIBIT "A" AS AN ORIGINAL EXHIBIT—Filed September 1, 1936

Upon consideration of the motion filed herein by the petitioner on review praying the Court to permit the transmission to this Court, as a physical exhibit, a certain exhibit filed in the United States Board of Tax Appeals, and to dispense with the printing thereof in the record on review, and it appearing that counsel for the respondent on review

has consented to the granting of said motion, it is by the Court this 31st day of August, 1936,

Ordered that the "Purchase Agreement" filed as Exhibit A to the Stipulation of Facts before the United States Board of Tax Appeals may, by the Clerk of said Board, be transmitted to this Court as a physical exhibit on review, and its printing may be dispensed with, and the Clerk of this Court is directed to transmit a certified copy of this [fol. 86] Order to the Clerk of the United States Board of Tax Appeals.

By the Court.

Martin T. Manton, U. S. C. J.

A True Copy. (S.) Wm. Parkin, Clerk. (Seal.)

IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

PRÆCIPE FOR RECORD—Filed September 15, 1936

To the Clerk of the United States Board of Tax Appeals:

As required by law and the rules of the United States Circuit Court of Appeals for the Second Circuit, please prepare and within sixty days from July 27, 1936, the [fol. 87] date on which the petition for the review by said Court of the decision and order rendered by the United States Board of Tax Appeals (hereinafter referred to as the Board) in the above-entitled proceeding was filed with you and on which a copy of said petition with notice that it had been so filed was served upon the respondent in said proceeding, transmit and deliver to the Clerk of said Court copies duly certified as correct of the following documents:

1. The docket entries of the proceedings before the Board in the above-entitled proceeding.
2. The petition, together with exhibits thereto, in said proceeding for redetermination of the deficiency of income tax.
3. The answer of the respondent in said proceeding.
4. Motion to consolidate related cases for hearing.
5. Stipulation of facts and exhibits thereto introduced at the hearing.

6. Statement of evidence and exhibits thereto.

7. Memorandum findings of fact and opinion entered April 30, 1936.

8. Decision of the Board entered in its records April 30, 1936.

[fol. 88] 9. The petition for the review of said decision by the United States Circuit Court of Appeals for the Second Circuit.

10. The notice of the filing of said petition with the Clerk of the Board and the admission of the service thereof on the respondent in said proceeding.

11. Order of the Circuit Court of Appeals for the Second Circuit for transmission of Exhibit A to Stipulation of Facts as an original exhibit.

12. This præcipe for record.

13. The notice of the filing of said præcipe for record with the Clerk of the Board and the admission of the service thereof on the respondent in said proceeding.

(S.) Richard H. Wilmer, Douglas L. Hatch, Attorneys for Petitioner.

Washington, D. C., September 15, 1936.

[fol. 89] In United States Circuit Court of Appeals

[Title omitted]

Notice of Filing Præcipe—Filed September 15, 1936

To Herman Oliphant, Esq., General Counsel for the Department of the Treasury, Attorney for the Respondent, Washington, D. C.

Sir:

Please Take Notice that on the 15th day of September, 1936, the undersigned attorneys for the petitioner in the above-entitled proceeding have filed with the Clerk of the [fol. 90] United States Board of Tax Appeals the præcipe for record, of which a copy is annexed hereto.

(S.) Richard H. Wilmer, Douglas L. Hatch, Attorneys for Petitioner.

Washington, D. C., September 15, 1936.

Admission of Service

Receipt of the foregoing notice of filing of the præcipe for record and service of a copy of the præcipe therein mentioned is acknowledged this 15th day of September, 1936, and no further designation is hereby noted on respondent's behalf.

(S.) Herman Oliphant, General Counsel for the Department of the Treasury, Attorney for the Respondent.

[fol. 91] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 92] Office Copy Entered

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

ARTHUR G. BOGARDUS, Appellant,

against

GUY T. HELVERING, Commissioner of Internal Revenue, Appellee

Before L. Hand, Swan and Augustus N. Hand, Circuit Judges

Petition to review an order of the Board of Tax Appeals adjudging a taxpayer liable for a deficiency in his income tax.

William D. Whitney for the petitioner.
John J. Pringle, Jr., for the respondent.

L. HAND, Circuit Judge:

This case involves the question whether the taxpayer, Bogardus, received "compensation for personal service" under § 22 (a) of the Revenue Act of 1928, when in 1931 the Unopco Corporation paid him $10,000 in the following circumstances. He had been in the employ of the Universal Oil Products Company; how long and in what capacity the record does not disclose; his salary for the year 1930 had been $6,000 and he had received a bonus of $2,000 at the end of the year. The company had been extraordinarily successful in its business, which consisted of granting licenses under patents for methods of oil refining; its revenues, beginning in 1922, had by the end of 1930 become very large, and its assets extremely valuable. Very early in the [fol. 93] year 1931, its shareholders sold all their shares to the United Gasoline Corporation for $25,000,000, having just before withdrawn $4,100,000 from their treasury, which they transferred to a new company, organized for the purpose, and called the Unopco Corporation, whose shares they issued to themselves in the old proportions. This new company had no other assets, and its only business was to manage and invest the fund transferred. The shareholders had

no interest in the United Gasoline Company, and had of course parted with all interest in the Universal Oil Products Company. The former employees of that company remained in its employ—Bogardus among them. A few days after these transactions were completed the president of the Unopco Corporation at a meeting of shareholders declared that "during these years while we were struggling and moving forward, we had had the loyal support of a number of employees most particularly, and he thought it would be a nice and generous thing for us to show our appreciation and to remember them in the form of a gift or honorarium; * * * all of the stockholders acquiesced and were glad to do it; and the result was that it was understood that we would come forward and make these presents or gifts to these employees that were to be slated for it." The beneficiaries comprised patent attorneys, solicitors and experts—some of them not retained since 1922 or 1923—engineers and chemists; and one was the sister of an employee who had been killed by an explosion. The resolution adopted by the board of directors was that the company "pay and distribute the said sum of Six Hundred Seven Thousand Five Hundred Dollars ($607,500) as a bonus to sixty-four (64) former employees, attorneys and [fol. 94] experts of said Universal Oil Products Company, in recognition of the valuable loyal services of said employees, attorneys and experts to said Universal Oil Products Company" in such sums as the directors should decide. The Unopco Corporation made no effort to deduct these payments as an expense of its business in its income tax return, and the donees did not charge themselves with what they received. The Board has held them all liable for a tax calculated upon the payments as income, and the Circuit Court of Appeals for the First Circuit has affirmed the ruling as to one, Judge Morton dissenting, (Walker v. Helvering, 87 Fed. (2) —).

Such payments may be at once "gifts" under § 22, subdivision (b) (3), and "compensation for personal service" under subdivision (a). Subdivision b was indeed entitled "Exclusions", and since it declared that the prescribed items "shall be exempt from taxation", it would perhaps not be unnatural to assume that, but for that exemption, they would have been within subdivision (a). Nevertheless it is evident upon reflection that some of them at least could by no possibility be "gains or profits", or among any of

the specific items which that subdivision enumerated; for example, life insurance; compensation for sickness or injury; and "inheritances" as well—unless in a very remote possibility. In these cases at any rate, the "exclusions" were not exceptions from gross income, and must have been included out of abundant caution. Furthermore, subdivision (b) (3) did not exempt under all conditions the specific items which it contained; for example, though a bequest or device to executors merely for qualifying is not "compensation for personal services", (United States v. Merriam, [fol. 95] 263 U. S. 179), it becomes such, if it is conditional on performance. Ream v. Bowers, 22 F. (2) 465 (C. C. A. 2); Rose v. Grant, 39 F. (2) 338 (C. C. A. 5). And indeed in all the cases where the taxability of bonuses and the like has been mooted, the payments have been legal gifts; except as they were, the taxpayer's position would not have been even plausible. The question has been whether, though gifts, they were also "compensation for personal services"; decisions like Old Colony Trust Co. v. Commissioner of Internal Revenue, 279 U. S. 716, proved that they could be both. When the donor is not an obligor, that is, when he is under no legal sanction to make the payment, the decision must therefore depend upon his intent—perhaps more properly upon his motive—and so the courts have very generally put it. Fisher v. Commissioner, 59 F. (2) 192 (C. C. A. 2); Schumacher v. United States, 55 F. (2) 1007, 1011; Bass v. Hawley, 62 F. (2) 721 (C. C. A. 5); Botchford v. Com'r., 81 F. (2) 914 (C. C. A. 9).

We have, however, not found much help in learning what that intent or motive must be, and, while the issue remains unsettled, it seems scarcely profitable to catalogue the evidence; we rather need a test by which to determine what evidence is relevant. We agree that a man may make a gift to an old employee without meaning it as "compensation"; though probably such cases will be uncommon, especially if he declares that the payment is "in recognition of" past services. We will assume that the gift would be nothing more, if for instance the donor believed that what he had paid in the past was the full measure of anything that the employee was then "entitled to"; that in fairness [fol. 96] he did not "owe" a cent; and that anything he might give was not only beyond what the law would exact, but what the employee could in justice demand. Even so

the past services would be the cause of the gift in the sense that except for them the donor would never have been moved to spontaneous generosity, but the gift would not pay for the services. On the other hand, employers sometimes feel that their employees have never been paid in full; that their services deserved more than they have received; that the account between them is not quite in equitable balance. Such gifts are "compensation", they are not only the result of the past relation, but they are a return specifically allocated to the donee's services. For example, a patient may increase his surgeon's bill; it would be "compensation", though a gift; yet, if he made him a present only because his skill, solicitude and kindness had bound them in a warm friendship, it would not be. A donor must not be moved to satisfy some uneasiness, some scruple, some sense that there is an outstanding claim which those would recognize to whose opinion he is sensitive; something which makes the payment more than an unconstrained act of affection or regard. In determining that question, the absence of any claim for deduction in the donor's tax return is of very little significance.

In the case at bar the parties have stipulated that "the payments were not made or intended to be made by said Unopco Corporation, or any of its stockholders as * * * compensation for any services rendered * * * by any of said employees * * * to said Unopco Corporation or to any of its stockholders. All of the recipients * * * were employees * * * of said Universal Oil Products Company at the time of the payment * * * or had [fol. 97] been prior thereto". This means that the donees had not been employees of the shareholders, but it does not mean that the shareholders had not benefited by those services, as they clearly had, since nobody else could. The intent and a motive of the shareholders was necessarily that of the donor, Unopco Corporation, which could have no independent intent and motive; and that intent and motive were precisely the same as though the shareholders had been the employers of the donees, which they were not. There is therefore no real difference in this regard between this case and Fisher v. Commissioner, supra, (59 F (2) 192). Nor is there any substantial difference in the motive which actuated that gift and these; for that decision cannot stand upon the donor's self-interest except by very strained assumptions; a bonus to a retiring president would very re-

motely affect the morale of the personnel at large; or even the donee's successor. The answer here is indeed doubtful, but on the whole we should have decided with the Board, had the decision been ours. The determining considerations appear to us to have been a little like those which control an award of salvage. The salaries and bonuses which had been paid while success was in doubt were fair enough as things then stood; but the highest hopes had been finally realized, and it seemed "nice and generous" to "recognize" by sharing the prize, those "loyal services" which had contributed to make them come true. The use of the words "honorarium" and "bonus" was particularly significant; shades of intent are often best seen by such unconscious choices. "Honorarium" is a word never used except to denote a compensatory payment; it is the very type of taxable transactions of this sort; and "bonus" is only a [fol. 98] little less definite. Left to ourselves we should therefore have been disposed to say that these gifts were actuated by a sense that in fairness the donees deserved something more than they had got in the past, now that the ship had come in. But the decision is not primarily for us at all; the Commissioner had first to make his, and then the Board its own; more exactly, the taxpayer had to show the Board that the Commissioner had been wrong, and he must show us not only that the Board was wrong, but that its conclusion was beyond any reasonable inference from the evidence. We cannot go that far, whatever would have been our doubts, if we had been in its place; indeed, so impalpable are the determinants, that in such cases its conclusion will generally be final.

Nor are we embarrassed because one of the payments was to the sister of an employee who was killed in the company's service. It is quite true that the motive in that instance could not have been to compensate her for his services, but it was to compensate her for his loss nevertheless; at least it may have been. There was no inconsistency in harboring such a motive along with a desire to compensate others for their contribution to the outcome. So far as it is relevant at all, that gift tended to confirm the Board's conclusion.

Order affirmed.

[fol. 98½] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Arthur G. Bogardus v. Helvering, Com'r. Opinion, L. Hand, C. J. 3-8-37, filed.

[fol. 99] Office Copy Entered

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

ARTHUR G. BOGARDUS, Appellant,

vs.

GUY T. HELVERING, Commissioner of Internal Revenue, Appellee

Before L. Hand, Swan and Augustus N. Hand, Circuit Judges

SWAN, C. J. (dissenting):

I cannot agree that the Board's decision, as expressed in its opinion, that the payments in question "were additional compensation in consideration of services rendered to Universal and were not tax-free gifts" is conclusively binding upon the court. The Board made no express finding that the payments were intended by Unopco or its stockholders as additional compensation for services of the recipients. Indeed, it was stipulated that "said payments were not made or intended to be made by said Unopco Corporation or any of its stockholders as payment or compensation for any services rendered or to be rendered or for any consideration given or to be given by any of said employees, attorneys or experts to said Unopco Corporation or to any of its stockholders." The evidentiary facts were undisputed, and I think the court is free to decide whether as a matter of law the payments were taxable or non-taxable. [fol. 100] See General Utilities Co. v. Helvering, 296 U. S. 200, 206; Washburn v. Commissioner, 51 F. (2d) 949, 951 (C. C. A. 8); Burnet v. Lexington Ice & Coal Co., 62 F. (2d) 906, 909 (C. C. A. 4); Commissioner v. Bonwit (C. C. A. 2), Feb. 8, 1937.

If the question is open, I am constrained to a different conclusion from that reached by my brothers. To my mind the facts indicate that the shareholders of Unopco, by reason of selling their Universal shares for such fabulous sums, were moved to an act of "spontaneous generosity", rather than actuated by a sense of moral obligation to pay for services, inadequately compensated in the past, from which they had benefited—if that distinction is to be the test be-

tween taxable and non-taxable gifts. The recipients of these payments were employees, attorneys and experts of Universal, many of whom had had no connection with that company since 1922. There is nothing to indicate that their services had not been adequately, or even generously, paid for by Universal when they were rendered, nor that any shareholder had any feeling that the accounts were not in "equitable balance" during all these years. Not until after the Universal shares had been sold and the president of Unopco suggested that it would be "a nice and generous thing" to show their appreciation in the form of a gift or honorarium was the matter of these payments ever considered. One of the recipients was the sister of an employee who had lost his life in 1919. Certainly the payment to her was purely a gift and cannot be taxed as compensation for services; yet there is nothing to indicate that the payment to her was actuated by any different motive from the payments to the others.

[fol. 101] When an employer makes a voluntary payment to his employee, it is reasonable to infer, in the absence of very special circumstances, that it is intended as additional compensation. Fisher v. Commissioner, 59 F. (2d) 192 (C. C. A. 2). When the payment is by a stranger, the natural inference is that of a gift. Lunsford v. Commissioner, 62 F. (2d) 740 (C. C. A. 6). Stockholders of a corporate employer, though legally strangers to its employees, may make gifts intended as additional compensation. Bass v. Hawley, 62 F. (2d) 721 (C. C. A. 5). There the stock of the corporate employer was owned by a holding company, which made the payment and had an interest to be served in maintaining the loyalty and good will of the employees to their corporate employer. In the present case the stockholders of Unopco can receive no possible benefit from payments to former or present employees of Universal. The decision of the majority of the court goes further than any previous authority except Walker v. Commissioner (C. C. A. 1, Feb. 12, 1937), involving the same transaction as the case at bar. I agree with Judge Morton's dissent in that case.

[fol. 101½] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Arthur G. Bogardus, Appellant, vs. Guy T. Helvering, Commissioner of Internal Revenue, Appellee. Opinion—Swan, C. J., dissenting. 3-8-37, filed.

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[fol. 115] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

ARTHUR G. BOGARDUS, Appellant,

against

GUY T. HELVERING, Commissioner of Internal Revenue, Appellee

Before L. Hand, Swan and Augustus N. Hand, Circuit Judges

On Petition for Rehearing

William D. Whitney for the petition.

Per CURIAM: Petition denied.

——, U. S. Circuit Judges.

Filed March 11, 1937.

[fol. 116] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 11th day of March, one thousand nine hundred and thirty-seven.

Present: Hon. Learned Hand, Hon. Thomas W. Swan, Hon. Augustus N. Hand, Circuit Judges.

ARTHUR G. BOGARDUS, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

A petition for a rehearing having been filed herein by counsel for the petitioner;

Upon consideration thereof, it is ordered that said petition be and hereby is denied.

Wm. Parkin, Clerk.

[fol. 117] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Arthur G. Bogardus vs. Commis-

sioner of Internal Revenue. Order. United States Circuit Court of Appeals, Second Circuit. Filed Mar. 11, 1937. William Parkin, Clerk.

[fol. 118] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Court House in the City of New York, on the 15th day of March one thousand nine hundred and thirty seven.

Present: Hon. Learned Hand, Hon. Thomas W. Swan, Hon. Augustus N. Hand, Circuit Judges.

ARTHUR G. BOGARDUS, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

Appeal from the United States Board of Tax Appeals

This cause came on to be heard on the transcript of record from the United States Board of Tax Appeals, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said United States Board of Tax Appeals be and it hereby is affirmed.

It is further ordered that a Mandate issue to the said Board in accordance with this decree.

Wm. Parkin, Clerk.

[fol. 119] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Arthur G. Bogardus vs. Commissioner of Internal Revenue. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Mar. 15, 1937. William Parkin, Clerk.

[fol. 120] UNITED STATES OF AMERICA,
Southern District of New York:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 119, inclusive, contain

a true and complete transcript of the record and proceedings had in said Court, in the case of Arthur G. Bogardus, Petitioner, against Commissioner of Internal Revenue, Respondent, as the same remain of record and on file in my office.

In testimony whereof I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 19th day of March, in the year of our Lord one thousand nine hundred and thirty-seven, and of the Independence of the said United States the one hundred and sixty-first.

Wm. Parkin, Clerk. (Seal, United States Circuit Court of Appeals, Second Circuit.)

[fol. 121] Supreme Court of the United States

Order Allowing Certiorari—Filed April 26, 1937

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 41,370. U. S. Circuit Court of Appeals, Second Circuit. Term No. 830. Arthur G. Bogardus, petitioner, vs. Commissioner of Internal Revenue. Petition for a writ of certiorari and exhibit thereto. Filed March 20, 1937. Term No. 830, O. T., 1936.

FILE COPY

No. 8[redacted] 15

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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1936.

ARTHUR G. BOGARDUS,

Petitioner,

against

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

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IN THE

Supreme Court of the United States

OCTOBER TERM 1936.

ARTHUR G. BOGARDUS,
Petitioner,

against

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Arthur G. Bogardus, respectfully prays for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit to review a decree of that Court, entered March 15, 1937, rehearing denied March 11, 1937, affirming a decision of the United States Board of Tax Appeals.

The majority and dissenting opinions of the Circuit Court of Appeals (majority opinion by Judge Learned Hand, dissenting opinion by Judge Thomas W. Swan) are as yet unreported, but appear at R. 92, 99. The opinion of the Board of Tax Appeals (unreported) appears at R. 21.

STATEMENT

The petitioner did not dispute below, and does not dispute here, the findings of fact by the Board of Tax Appeals.

The relevant facts are:

Petitioner was an employee of Universal Oil Products Company (hereinafter called Universal) (R. 77). On January 6, 1931, all of the stock of Universal was sold to United Gasoline Corporation (R. 17). Prior to the sale, the stockholders of Universal had formed an investment company under the name of Unopco Corporation to hold $4,000,000 of current assets withdrawn from the treasury of Universal (R. 17). Unopco had no other purpose and did not either in form or in substance continue the business of Universal, which was the developing and licensing of patents (R. 17, 57). Universal continued in business[1], but with new stockholders (R. 17). After the sale of the Universal stock, and when the stockholders no longer had any interest whatsoever in the business of Universal, one of the stockholders (formerly the President of Universal) suggested to the others that it would be a nice and generous thing to make a gift or honorarium to a number of the old employees of Universal (R. 18, 49). This matter had not been thought of until after the Universal stock had been sold (R. 49, 61-2). Pursuant to this suggestion, the directors *and stockholders* of Unopco voted to pay a bonus to certain former employees of Universal in recognition of their valuable and loyal services to Universal in the past (R. 18, 19).

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[1]See *Skelly Oil Company* v. *Universal Oil Products Company,* 293 U. S. 612, and *Root Refining Company* v. *Universal Oil Products Company,* 296 U. S. 626.

It is stipulated that neither Universal, nor Unopco, nor any of the stockholders of either, were under "any legal *or other* obligation" to make the payments in question (R. 64, 65). It was further stipulated that none of the recipients was or ever had been employed by, or had ever rendered any services to, Unopco or any of its stockholders (R. 63). Again, it was stipulated that the payments were not made or intended to be made by Unopco or by any of its stockholders as payment or compensation for any services rendered or to be rendered, or for any consideration given or to be given to Unopco or to any of its stockholders (R. 65). In fact, the employees had not merely been paid their full salaries for 1930 by Universal, but had in addition been paid bonuses for that year by Universal, in amounts not merely proportionate to their salaries, but evidently calculated to compensate them in proportion to their abilities (R. 77-82).

Universal had been extraordinarily successful in its business, and the sale of its stock netted $25,000,000, representing what was in effect a windfall to its old stockholders.

The total amount of the distribution by the old stockholders of Universal, through Unopco, to past and present employees of Universal aggregated $607,500 (R. 17, 18).

The recipients included not merely employees of Universal, but a number of persons who had been out of the employ of Universal for many years, patent attorneys and patent experts some of whom had not acted for many years, and the sister of an employee of Universal who had been killed in the explosion of a plant thirteen years before (R. 20, 50, 84).

A number of the letters transmitting the moneys to the beneficiaries were included in the stipulation of facts be-

fore the Board (R. 67-76), and they uniformly used language appropriate to gifts, of which the following is typical:

> "Here is the slice of bacon which the old stockholders of Universal want you to have as a gift from them, and which was saved for you out of the party given on January 6 at Chicago" (R. 67-8).[2]

Again:

> "The enclosed check is sent you on behalf of all the old stockholders of Universal as a gift to you in appreciation of the relationship which has existed, and because you were considered one of the family this piece of cake has been saved for you from the party we gave here January 6" (R. 68-9).

Neither Unopco (from whose treasury the gifts were made), nor Universal, nor any of the stockholders, claimed a deduction on their income tax returns (R. 20). Petitioner did not return the gift as taxable income (R. 67).

Accepting as we do the findings of fact by the Board, and the record being undisputed, the function of the Court becomes one to decide whether the correct rule of law was applied to the facts found. *Helvering* v. *Rankin,* 295 U. S. 123, 131, and cases cited; *cf. General Utilities & Operating Co.* v. *Helvering,* 296 U. S. 200. The decision of the Board is of course not final on the ultimate question of law whether, on the facts as found, the payment was a compensation or a gift within the statute.

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[2]This refers to the closing of the sale of stock for $25,000,000.00.

APPLICABLE STATUTE

The case is controlled by § 22 of the Revenue Act of 1928 (45 Stat. 797-8). The pertinent provisions follow:

"SEC. 22. GROSS INCOME.

"(a) *General definition.*—'Gross income' includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever.

"(b) *Exclusions from gross income.*—The following items shall not be included in gross income and shall be exempt from taxation under this title:

* * * * * * * *

(3) *Gifts, Bequests, and Devises.*—The value of property acquired by gift, bequest, devise, or inheritance (but the income from such property shall be included in gross income);"

THE QUESTION PRESENTED

The question presented is whether these payments were "compensation" under § 22(a) or "property acquired by gift" under § 22(b)(3).

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

A direct conflict is presented with the decision of the Circuit Court of Appeals for the Third Circuit in *Jones* v. *Commissioner of Internal Revenue,* 31 F. (2d) 755. The same Circuit Court of Appeals adhered to its view in the later case of *Cunningham* v. *Commissioner,* 67 F. (2d) 205.

The case is further indistinguishable in substance from a case in the Ninth Circuit, *Blair* v. *Rosseter,* 33 F. (2d) 286, decided favorably to the taxpayer.

A case involving substantially identical facts with the present case was, however, decided adversely to the taxpayer by the Circuit Court of Appeals for the First Circuit in *Walker* v. *Commissioner* (as yet unreported) decided February 12, 1937, Judge Morton dissenting.[3] A petition for rehearing in this case had not been acted upon at the date of this petition for certiorari.

There appear, therefore, to be three direct decisions in two Circuit Courts of Appeal on this question favorable to the taxpayer, and two decisions in two Circuit Courts of Appeal adverse to the taxpayer. In each of the adverse decisions, one judge dissented (Judge Morton in the *Walker* case in the First Circuit, and Judge Swan in the instant case in the Second Circuit).

Cases involving the same subject (payments by corporations to persons who had rendered services) have arisen in the Fourth, Fifth, and Sixth Circuit Courts of

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[3]**Ten pamphlet copies of the majority and minority opinions in the Circuit Court of Appeals for the First Circuit will be filed herewith.**

Appeal, and in the Court of Appeals of the District of Columbia. Decided in favor of the Commissioner under the particular facts presented:

Noel v. *Parrott* (C. C. A. 4), 15 F. (2d) 669;
Bass v. *Hawley* (C. C. A. 5), 62 F. (2d) 721;
Levey v. *Helvering* (App. D. C.), 68 F. (2d) 401.

Decided in favor of the taxpayer under the particular facts presented:

Lunsford v. *Commissioner* (C. C. A. 6), 67 F. (2d) 740.

The foregoing eight cases arising in seven different Courts of Appeal (together with other cases on the same subject arising in the same courts, *Fisher* v. *Commissioner,* 59 F. (2d) 192 (C. C. A. 2), *Botchford* v. *Commissioner,* 81 F. (2d) 914 (C. C. A. 9), *Lougee* v. *Commissioner,* 63 F. (2d) 112 (C. C. A. 1), *Anderson* v. *Commissioner,* 79 F. (2d) 979 (C. C. A. 2), *Davis* v. *Commissioner,* 81 F. (2d) 137 (C. C. A. 6), and *Weagant* v. *Bowers,* 57 F. (2d) 679 (C. C. A. 2)) indicate the constant recurrence of the question and the importance and desirability of an authoritative decision thereon by this Court, quite apart from the fact that on the facts of this case (as compared with the facts in *Jones* v. *Commissioner,* 31 F. (2d) 755, *supra*), a clear-cut conflict is presented.

The present case presents an apt opportunity for such an authoritative decision, in that all of the indiciae in the record, and as found by the Board, are in favor of the taxpayer's view, except only that the language of the Unopco

Corporation resolution included a reference to "recognition" by the former stockholders that "valuable and loyal services" had been rendered to Universal, the corporation in which they no longer had any interest.

Accordingly, the case presents the broad question whether the single fact of recognition, in the mind of the donor[4], is conclusive against the taxpayer. Stated conversely, the question is presented whether, in order to constitute a gift under the statute, the payment must be (as a majority of the Court below indicated it must be) "an unconstrained act of affection or regard".

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Second Judicial Circuit, sitting at New York, New York, commanding said Court to certify and send up to this Court, on a date to be designated, a full and complete transcript of the record and of all proceedings in the Circuit Court of Appeals had in this case, to the end that this case may be reviewed and determined by this Court; that the decree of the Circuit Court of Appeals be

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[4]The Circuit Courts of Appeal, following a decision by the Second Circuit in *Fisher* v. *Commissioner*, 59 F. (2d) 192, have generally agreed that the intent of the donor is the governing consideration. As pointed out in Judge Swan's dissenting opinion, the Board made no ultimate finding in the present case that the stockholders had a compensatory and not a donative interest, but left to the Court the question (one of law) whether, on the facts *as found*, the payment represented compensation or a gift.

reversed; and that your petitioner be granted such other and further relief as may seem proper.

ARTHUR G. BOGARDUS,
Petitioner

By

WILLIAM D. WHITNEY,
Counsel for Petitioner,
Office & Post Office Address,
15 Broad Street,
New York, N. Y.

March 19, 1937.

BRIEF IN SUPPORT OF PETITION

OPINIONS BELOW

The majority and dissenting opinions of the Circuit Court of Appeals (majority opinion by Judge Learned Hand, dissenting opinion by Judge Thomas W. Swan) are as yet unreported, but appear at R. 92, 99. The opinion of the Board of Tax Appeals (unreported) appears at R. 21.

JURISDICTION

The jurisdiction of this Court is invoked under § 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (43 Stat. 938, 28 U. S. C. § 347(a), and § 1003(a) of the Revenue Act of 1926 (44 Stat. 110, 26 U. S. C. § 1226(a)). The date of the decree of the Circuit Court of Appeals for the Second Circuit to be reviewed was March 15, 1937. Rehearing was denied March 11, 1937.

SPECIFICATION OF ERRORS

(1) The Court below erred in affirming the decision of the Board of Tax Appeals, decreeing that there was a deficiency due by the petitioner in respect of his income tax for the calendar year 1931.[5]

(2) The Court below erred in holding that the same payments "may be at once *'gifts'* under § 22 subdivision (b)(3), and *'compensation for personal service'* under subdivision (a)".

---

[5]The deficiency in this particular case is a very small amount, but the *principle* of this case governs those of the other recipients of the same benefaction and the aggregate amount involved is substantial.

(3) The Court below erred in holding that the payments here involved, "though gifts", were taxable.

(4) The Court below erred in confining gifts in effect only to those which resulted solely because the relation of employee to employer "had bound them in a warm friendship", and in rejecting as gifts all those where there exists "something which makes the payment more than an unconstrained act of affection or regard".

(5) The Court below erred in holding that the proposal to make a "gift or honorarium" evidenced an intent to pay compensation, because the word "honorarium" is "a word never used except to denote a compensatory payment; * * *"[6]

(6) The Court erred in holding that the intent and motive of the donors "was precisely the same as though the shareholders had been the employers of the donees, *which they were not.*"

STATEMENT AND ARGUMENT

The facts are stated in the petition for the writ. There is no dispute as to the facts, for we accept the findings of the Board, and the record otherwise consists principally of a stipulation, and partially of uncontradicted testimony.

The error is one of law.

---

[6]The Court's opinion refers only to "honorarium", but the word "gift" is coupled with it in the record (R. 18, 49). In any event, there is an explicit controversy with the Third Circuit over the meaning of "honorarium", that Court saying in *Cunningham* v. *Commissioner,* 67 F. (2d) 205, *supra:* "It is clear to us that the money was a gift, a voluntary honorarium, * * *."

The Circuit Court of Appeals frankly says that it considers that there is a class of taxable gifts. This appears to us to be little else then judicial legislation, as Congress selected its own terminology and decreed that "gifts" should not be taxable.

Old Colony Trust Company v. *Commissioner,* 279 U. S. 716, does not aid the Court below. The Court below construed it as holding that payments may be *both* gifts and compensation, *i.e.,* construed it as an instruction to the Courts to disregard the terminology of the statute (which made the question whether the payments were gifts or compensation determinative of the question of taxability). We find no such meaning in the opinion of this Court. What this Court did hold was that a payment might under certain circumstances be a gift, even though not made pursuant to a *legal obligation.* The relevant language (279 U. S. at pp. 729 and 730) follows:

> "The certificate shows that the taxes were imposed upon the employee, that the taxes were actually paid by the employer and that the employee entered upon his duties in the years in question under the express agreement that his income taxes would be paid by his employer. This is evidenced by the terms of the resolution passed August 3, 1916, more than one year prior to the year in which the taxes were imposed. The taxes were paid upon a valuable consideration, namely, the services rendered by the employee and as part of the compensation therefor. We think therefore that the payment constituted income to the employee."
>
> * * * * * * * *
>
> "Nor can it be argued that the payment of the tax in No. 130 was a gift. The payment for services,

> even though entirely voluntary, was nevertheless compensation within the statute * * *."

In the *Old Colony* case, the taxpayer apparently argued that, because there was no *legal* obligation, it necessarily followed that the payment was a gift. The holding of this Court went no further than to negative this and to state that where there was consideration for the payment, the lack of a legal obligation would not convert it into a gift.

But in the present case, on the other hand, there was not merely no legal obligation, but there was *no* "other obligation" (R. 64, 65). The payment, moreover, "was not made or intended to be made * * * for any consideration" moving to the donor (R. 65). Moreover, no detriment, such as loss of employment, was suffered by the recipients. The payment was one purely of "spontaneous generosity".

In this case are combined all of the indiciae which have been formerly recognized by Circuit Courts of Appeal in employer-employee cases, as evidencing intention to make a gift:

> 1. The recipients had never been employed by Unopco, the donor, or by its stockholders, and had never rendered any services to them (R. 63).
>
> 2. Unopco, and its stockholders, had *no interest whatsoever* in the future services of the recipients, who continued in the employ of Universal (R. 56).
>
> 3. The distribution by the old Universal stockholders through Unopco had not even been thought of until all relationship with Universal and its employees had been severed (R. 49, 61-2).

4. The distribution was termed a "gift" in contemporary statements and correspondence (R. 18, 67-76).

5. The distribution was approved as a gift by the stockholders of Unopco, evidencing that it was not deemed within the powers of the Board of Directors to grant (R. 18).

6. No deduction, either by Universal, by Unopco, or by the individual shareholders, was taken for this distribution as compensation paid employees (R. 20).

7. Unopco, the donor, and its stockholders were under no "legal or other obligation" to make this payment (R. 64, 65).

8. The payment was "not made or intended to be made * * * as payment or compensation for any services rendered or to be rendered or for any consideration given or to be given * * * to said Unopco Corporation or to any of its stockholders" (R. 65).

It is respectfully submitted that, if the Commissioner is to prevail in the present case, then there will be no case in which a former employee will ever be construed to receive a gift except only that case in which the employment has served merely as the medium for introducing the employer to the employee, and the gift has flown exclusively from a relationship of love or affection thereafter arising on personal grounds between them. Indeed, this is the view of the majority of the Circuit Court of Appeals. The single fact that the donor had some *recognition* that valuable and loyal services had been rendered in the past

(as distinct from having mere love or affection) was held decisive. In effect, gifts are by this decision confined to relatives or persons occupying analogous positions.[7]

The following were the facts in the cases which reached a contrary result:

Jones v. *Commissioner* (C. C. A. 3), 31 F. (2d) 755.

This case provides the clear-cut conflict with the present one. The stockholders of a corporation sold their stock to third parties for $3,000,000. $300,000 of this amount was by previous agreement distributed to the officers and administrative staff of the corporation, who had been long employed by it, since it was felt that they would lose their positions by reason of change of ownership. The corporation had considered making this payment to its employees, but later the plan was changed since it was felt the corporation could not legally make a gift. The officer in charge referred to the desirability of making the payment "in consideration of such a sudden termination of the business association and in recognition of the efforts and devotion of the officers and certain old employees of the companies over a long period of years." (10 B. T. A. 202, 204). The Circuit Court of Appeals stated that the payment was "in recognition of the past faithful work of the staff" (31 F. (2d) at p. 756).

---

[7]That no case could be stronger for the taxpayer than the present is illustrated with peculiar aptness by the fact that the letters of the President to recipients, which letters were in effect part of the *res gestae*, said that the gifts were being made because the recipients were recognized as "one of the family" (R. 69, 70), or as "a member of the family" (R. 72, 76).

The case was a distinctly stronger one for the Commissioner than the present case, in that (1) the officers and old employees there suffered the detriment of losing their positions (whereas in our case those who had not previously terminated their employment, continued in the employ of Universal), and (2) the employer had itself considered making the payment (whereas in our case the suggestion that the payment be made never arose until after all relationship had been severed between the corporate employer and the paying shareholders).

In the *Jones* case the Board of Tax Appeals, as in our case, had decided in favor of the Commissioner. This decision was *reversed* by the Circuit Court of Appeals. The decision of the Circuit Court of Appeals for the Third Circuit is therefore directly in conflict with the decision of the Circuit Court of Appeals for the Second Circuit in this case, which affirmed the Board of Tax Appeals.

Cunningham v. *Commissioner* (C. C. A. 3), 67 F. (2d) 205

This case confirmed the view enunciated by the Circuit Court of Appeals for the Third Circuit in *Jones* v. *Commissioner, supra.* Here the stock of a corporation had been purchased by Canadian interests and a new set of directors elected. The president voluntarily resigned. Thereupon, the Board of Directors made a payment of $15,000 to the president "in appreciation of Mr. Cunningham's excellent guidance of this corporation during the times of difficulty and depression". The Board of Tax Appeals held for the Commissioner and decided that the payment was compensation. The Circuit Court of Appeals for the Third Circuit reversed the Board of Tax Appeals

and held that the payment was a gift, thus conflicting in theory with the decision of the Circuit Court of Appeals for the Second Circuit in the instant case.

By reversing the Board of Tax Appeals in the *Jones* and *Cunningham* cases, *supra*, the Circuit Court of Appeals for the Third Circuit necessarily held that there was no substantial evidence supporting the decision of the Board that the payments were compensation, and hence these decisions are in direct conflict with the instant case in so far as it may hold that the Board's decision was supported by substantial evidence and could not be reversed.

Blair v. *Rosseter* (C. C. A. 9), 33 F. (2d) 286.

In this case a corporation, with full approval of its stockholders, made a payment of $50,000 to its president "as a gift in recognition of his able and successful direction of the affairs of the company through the past ten years". The Court defined a gift as a "voluntary transfer of property from one to another without any consideration or compensation therefor", and held that the payment to the president was a gift and not compensation for services.

Lunsford v. *Commissioner* (C. C. A. 6), 67 F. (2d) 740.

Here a corporation made a payment of $50,000 to an employee of another corporation (but with the assent of the employing corporation) for his services in putting through a sale of assets by the paying corporation to the employing corporation. Although it did not appear that the stockholders of the paying corporation had ratified the payment, the Court held that it was a gift.

It therefore appears that not only is the decision of the Circuit Court of Appeals for the Second Circuit in the instant case on a matter of substantial importance, but it is in conflict with decisions in other Circuits.

For the foregoing reasons, it is respectfully requested that this Court exercise its supervisory powers and that the writ be allowed.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1936

No. [redacted] 15

ARTHUR G. BOGARDUS,

Petitioner,

against

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION

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IN THE

Supreme Court of the United States

OCTOBER TERM 1936

No. 830

ARTHUR G. BOGARDUS,
Petitioner,

against

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Mindful that the rules of this Court do not specifically provide for the filing of reply briefs on petitions for writ of certiorari, yet this petitioner respectfully requests that, in view of the fact that the brief submitted by the respondent has cited a Circuit Court of Appeals decision handed down since the filing of the petition herein, and of the further fact that this Court has itself in the interim handed down a decision pertinent hereto (*Helvering* v. *Tex-Penn Oil Company*), this reply brief be received and be considered.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The respondent does not appear to dispute that the decision of the court below is in conflict with the decisions of the Circuit Courts of Appeals for the 3rd Circuit in *Jones* v. *Commissioner,* 31 F. (2d) 755, and *Cunningham* v. *Commissioner,* 67 F. (2d) 205, and for the 9th Circuit in *Blair* v. *Rosseter,* 33 F. (2d) 286.

The respondent attempts to distinguish the 6th Circuit case of *Lunsford* v. *Commissioner,* 62 F. (2d) 740, upon the ground that in that case "the taxpayer had neither been in the employ of nor performed services for the donor" (Br. 9). But the very point of the present case is that it is here stipulated that the taxpayer had never been employed by the donors and had never rendered any services to them (R. 63).

The fact of conflict with other circuits is thus substantially admitted.

As presenting a conflict on a much-debated question, with the 1st, 2nd and 4th circuits ranged on one side, and the 3rd, 6th and 9th on the other, this case appears, therefore, to be a peculiarly appropriate one for grant of the writ of certiorari.

The respondent, although not attempting to distinguish the decisions in the 3rd and 9th circuits, seeks to dispose of them on the grounds, (1) that they were decided before this Court had given the definition of the powers of appellate courts contained in *Elmhurst Cemetery Co. of Joliet* v. *Commissioner,* No. 255, October Term, 1936, decided February 1, 1937, and (2), that one of them was decided before *Old Colony Trust Co.* v. *Commissioner,* 279 U. S. 716.

The *Elmhurst* case was merely an application of the well-settled doctrine that the Board's findings of fact as to value are conclusive if supported by substantial evidence. More pertinent to the present case is *Helvering* v. *Tex-Penn Oil Company,* No. 207, October Term, 1936, decided March 29, 1937, in which this Court had occasion to point out very clearly the difference between the scope of review of the findings of the Board as to primary, evidentiary or circumstantial facts, and of review of its ultimate findings.

The ultimate finding of the Board in the present case was that the payment was "compensation for personal services" rather than a "gift". This was a finding in the very language of the statute, and constituted, within the meaning of the *Tex-Penn* case, a "conclusion of law, or at least a determination of a mixed question of law and fact". Therefore, it was "subject to judicial review and, on such review, the court may substitute its judgment for that of the board." Therefore the decision of the Court below in this case that the ultimate finding of the Board was conclusive, is in conflict with the decision of this Court in *Helvering* v. *Tex-Penn Oil Company, supra.*

As to the argument of respondent that *Jones* v. *Commissioner,* 31 F. (2d) 755, is not in conflict with the instant case because it was decided before *Old Colony Trust Co.* v. *Commissioner,* 279 U. S. 716, it is sufficient to say that all that the *Old Colony Trust* case decided was that a voluntary payment, *if made for a consideration,* was not a gift. Where a payment is made to persons in whose employment the donor no longer has any interest, there could be no finding of consideration as there was in the *Old Colony* case. In both the present case and the *Jones* case, the payment was made by the former stockholders of a

corporation to employees of the corporation in whose services they no longer had any interest. Indeed, in this case *it is stipulated* that there was no consideration to the donors for the payment (R. 65).

To summarize:

In the light of respondent's brief, it appears that the writ of certiorari should be granted in this case, *first*, to settle a clear conflict between the circuits, and *second*, to resolve what may well be a conflict with the decisions of this Court in the *Tex-Penn* and *Old Colony cases*.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1937

No. 15

ARTHUR G. BOGARDUS,

Petitioner,

against

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1937

ARTHUR G. BOGARDUS,
Petitioner,
against
COMMISSIONER OF INTERNAL REVENUE,
Respondent.

No. 15

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 9) is unreported. The opinions of the Circuit Court of Appeals (majority opinion by Judge Learned Hand, dissenting opinion by Judge Thomas W. Swan (R. 63, 68)) are reported in 88 F. (2d) 646, 649.

JURISDICTION

The jurisdiction of this Court is invoked under §240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 938, 28 U. S. C. §347(a)) and §1003(a) of the Revenue Act of 1926 (44 Stat. 110, 26 U. S. C. §1226(a)). The decree of the Circuit Court of Appeals for the Second Circuit was entered on March 15,

1937 (R. 72). Rehearing was denied on March 11, 1937 (R. 71). Petition for certiorari was filed March 20, 1937, and was granted by an order filed on April 26, 1937 (R. 73).

THE QUESTION PRESENTED

The question presented by this case is as follows:

When the former stockholders of X Corporation pursuant to a plan first formulated after they had severed all interest in X Corporation, give $607,500 (through Y Corporation, which is owned by them) to certain present and former employees, experts and counsel of X Corporation, it being stipulated that:

(a) neither the donors nor X Corporation were under any "legal or *other* obligation" to make the payment; and

(b) the payment was not made or intended to be made "as payment or compensation for any *services* rendered or to be rendered or for any *consideration* given or to be given" by the donees to the donors;

and both donors and donees treat the transaction as a gift in their income tax returns, is this $607,500 payment "compensation for personal service" under §22(a) of the Revenue Act of 1928, or is it a "gift" not subject to income tax under §22(b)(3) of said Act?

Accepting, as we do, the findings of fact by the Board of Tax Appeals, and the record being undisputed, the

function of the Court becomes one to decide whether the correct rule of law was applied to the facts found. *Helvering* v. *Tex-Penn Oil Company,* 300 U. S. 481; *Helvering* v. *Rankin,* 295 U. S. 123, 131 and cases cited.

THE STATUTE

This case is controlled by §22 of the Revenue Act of 1928 (45 Stat. 797-8), the pertinent provisions of which are as follows:

> "SEC. 22. GROSS INCOME.
>
> "(a) General definition.—'Gross income' includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever.
>
> "(b) Exclusions from gross income.—The following items shall not be included in gross income and shall be exempt from taxation under this title:
>
> * * * * * * * *
>
> "(3) Gifts, Bequests, and Devises.—The value of property acquired by gift, bequest, devise, or inheritance (but the income from such property shall be included in gross income);"

STATEMENT

The petitioner did not dispute below, and does not dispute here, the findings of fact by the Board of Tax Appeals (R. 10-14).

The relevant facts are:[1]

Petitioner was an employee of Universal Oil Products Company (hereinafter called "Universal") (R. 50). On January 6, 1931, all the stock of Universal was sold to United Gasoline Corporation (R. 11). Prior to the sale, the stockholders of Universal had formed an investment company under the name of Unopco Corporation to hold approximately $4,000,000 of current assets and cash withdrawn from the treasury of Universal (R. 11). Unopco had no other purpose and did not either in form or in substance continue the business of Universal, which was the developing and licensing of patents (R. 11, 36). Universal continued in business, but with new stockholders (R. 11).

After the sale of the Universal stock and when the stockholders no longer had any interest whatsoever in the business of Universal, one of the stockholders, formerly the President of Universal, suggested to the others that it would be a nice and generous thing to make a gift or honorarium to a number of the old employees of Universal (R. 12, 31). This matter had not been thought of until after the Universal stock had been sold (R. 31, 39). Pursuant to this suggestion, both the directors and stockholders of Unopco voted to pay a bonus to certain former employees of Universal in recognition of their valuable and loyal serv-

---

[1]The evidence consists of the undisputed testimony of two witnesses for the petitioner (R. 28-34) and a stipulation of facts (R. 35-58).

ices to Universal in the past (R. 12).[2] These payments were made during January, 1931 (R. 38).

Universal had been extraordinarily successful in its business, and the sale of its stock netted $25,000,000 (R. 11) representing what was, in effect, a windfall to its old stockholders. The total amount of the distribution by the old stockholders of Universal, through Unopco, to past and present employees of Universal, aggregated $607,500 (R. 12).

The recipients included not merely employees of Universal, but a number of persons who had been out of the employ of Universal for many years—patent attorneys and patent experts, some of whom had not acted for many years, and the sister of an employee of Universal who had been killed in the explosion of a plant thirteen years before (R. 13, 31-32, 58).[3]

---

[2]The resolution adopted by the stockholders of Unopco (which is, in substance, the same as that adopted by the board of directors), reads (R. 12):

> "RESOLVED FURTHER, that this Corporation do appropriate, pay and distribute the said sum of Six Hundred Seven Thousand Five Hundred Dollars ($607,500) as a bonus to sixty-four (64) former and present employees, attorneys and experts of said Universal Oil Products Company, in recognition of the valuable and loyal services of said employees, attorneys and experts to said Universal Oil Products Company, said sum to be distributed among said sixty-four (64) employees, attorneys and experts in such amounts to each employee, attorney and expert as the Board of Directors of this Corporation shall determine."

[3]See R. 58 for a list of recipients not employees of Universal, either because they were independent attorneys or experts, or because they had previously ceased their employment. See also Reichmann's testimony (R. 31-32).

A number of the letters transmitting the moneys to the beneficiaries are included in the stipulation of facts before the Board (R. 43-49), and they uniformly use language appropriate to gifts, of which the following is typical:

> "Here is the slice of bacon which the old stockholders of Universal want you to have as a gift from them, and which was saved for you out of the party given on January 6 at Chicago"[4] (R. 43).

Again:

> "The enclosed check is sent you on behalf of all the old stockholders of Universal as a gift to you in appreciation of the relationship which has existed, and because you are considered one of the family this piece of cake has been saved for you from the party we gave here January 6" (R. 44).

It is stipulated that neither Universal nor Unopco nor any of the stockholders of either were under "any legal *or other* obligation" to make the payments in question (R. 40, 41). It is further stipulated that none of the recipients "was ever in the employ of * * * or ever rendered any services to" Unopco or any of its stockholders (R. 40). Again, it is stipulated that the "payments were not made or intended to be made" by Unopco or by any of its stockholders "as payment or compensation for any services rendered or to be rendered or for any consideration given or to be given" by the recipients to Unopco or any of its stockholders (R. 41). In fact, the employees had not merely been paid their full salaries for 1930 by Universal, but had, in addition, been paid bonuses for that year by Universal, in amounts

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[4]The reference to "the party given at Chicago" is to the closing of the sale of the Universal stock for $25,000,000.

not merely proportionate to their salaries, but evidently calculated to compensate them in proportion to their abilities (R. 50-57).[5]

Neither Unopco (from whose treasury the gifts were made) nor Universal nor any of the stockholders of either claimed a deduction for these payments in their income tax returns (R. 13, 42). Petitioner did not return the gift as taxable income (R. 43).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In affirming the decision of the Board of Tax Appeals decreeing that there was a deficiency due by the petitioner in respect of his income tax for the calendar year 1931.

2. In holding that the same payments "may be at once 'gifts' under §22, subdivision (b)(3), and

[5]Thus, the bonuses paid by Universal itself for the year 1930 represented varying percentages of the respective salaries for that year, and presumably were meant finally to adjust fair compensation for the full year (R. 50). The petitioner's bonus was 33⅓% of his salary. Taking the first 10 other employees on the list, it will be observed at a glance (R. 50) that their bonuses represented the following respective percentages of their salaries: 33⅓, under 20, nearly 60, 16, over 40, over 50, nearly 100, under 3, nearly 20, and approximately 40. The same variety continues throughout the list of the principal employees. Further emphasis is given by the fact that the subordinate employees received regular bonuses of 10%, thereby emphasizing the consciousness of the effort of Universal itself to adjust the compensation of the key employees. But it was to the key employees that the gifts involved in this and the related cases were made by Unopco. Clearly, these gifts were not primarily intended to adjust compensation, but rather to reflect affection.

'compensation for personal service' under subdivision (a)" (R. 64).

3. In holding that the payments here involved, "though gifts", were taxable (R. 65).

4. In confining gifts, in effect, only to those which result solely because the relation of employee to employer "had bound them in a warm friendship" and in rejecting, as gifts, all those where there exists "something which makes the payment more than an unconstrained act of affection or regard" (R. 66).

5. In holding that the proposal to make a "gift or honorarium" evidenced an intent to pay compensation because the word "honorarium" is "a word never used except to denote a compensatory payment; * * *" (R. 67).

6. In holding that the intent and motive of the donors "was precisely the same as though the shareholders had been the employers of the donees, which they were not" (R. 66).

SUMMARY OF ARGUMENT

Although this case falls within the general classification of cases involving gifts to present or former employees, it is one in which the employment relationship had fully terminated before the making of the payment was thought of. The payment was stipulated to have been without "legal or *other* obligation" on the part of the donors, and for no services rendered or consideration given to the donors. If such a payment be held to be additional compensation, it is hard to conceive of a case in which any employee could ever be held to have received a gift from a present or former employer.

The statute provides different rules for gifts and for additional compensation. The position of the majority of the Circuit Court of Appeals that this was indeed a gift, but a taxable gift, is, therefore, untenable.

The Circuit Court of Appeals confined non-taxable gifts to payments dictated by "unconstrained affection". So confined a construction of the word "gift" is in direct conflict with the English cases, which have been numerous, and finds no support in prior decisions of our Circuit Courts of Appeal. But even if it be sound, it is impossible to conceive a case of payment to a former employee which would more nearly fall within the suggested rule, for these employees were referred to by the donors as "members of the family".

The only plausible argument for taxability of this gift is that it was made in *recognition* of former valuable services. But this factor of recognition is present in every employee case, and to accept the argument is to hold that all gifts to past or present employees must be taxable. Such a ruling contradicts the established rule of all of the circuits prior to this case, for in all prior cases of payments to employees the courts had considered it their duty closely to analyze the various recognized *indicia* for determining whether the particular payment in question was a gift or additional compensation.

In this case, all the previously recognized *indicia* for such determination combined in favor of the petitioner.

The case presents a question of law,—or a mixed question of law and of fact,—whether on the basis of the Board's findings (which we accept) the right rule has been applied. The answer to that question is for the courts to determine.

ARGUMENT

I

THE PAYMENT MADE TO PETITIONER WAS A "GIFT" WITHIN THE MEANING OF §22(b).

(a) The meaning of the word "gift".

Section 22(b)(3) of the Revenue Act of 1928 excludes from gross income the "value of property acquired by gift". In using the word "gift" the Congress meant to employ the ordinary meaning of the term. *Woolford Realty Co.* v. *Rose,* 286 U. S. 319, 327; *Old Colony Railroad Co.* v. *Commissioner,* 284 U. S. 552, 560; *Lynch* v. *Alworth-Stephens Co.,* 267 U. S. 364, 370.

If there were any doubt as to the interpretation of the word "gift", it would have to be resolved in favor of the taxpayer. *Gould* v. *Gould,* 245 U. S. 151; *Burnet* v. *Niagara Falls Brewing Company,* 282 U. S. 648.

But the applicability of the term "gift" to the transaction in this case appears to be supported alike by dictionary definition, Congressional intention and judicial construction.

The word "gift" is defined in Webster's New International Dictionary (2d Ed.) as "anything voluntarily transferred by one person to another without compensation". A similar definition has been laid down by the courts, namely, a "voluntary transfer of property from one to another without any consideration or compensation therefor". *Blair* v. *Rosseter,* 33 F. (2d) 286 (C. C. A. 9); *Noel* v. *Parrott,* 15 F. (2d) 669, 671 (C. C. A. 4).

Although the word "gift" is not defined anywhere in the revenue laws, the committee reports of both the Senate

Committee on Finance and the House Committee on Ways and Means, in explaining what was included within the word "gift" for purposes of the gift tax in the Revenue Act of 1932 (47 Stat. 245), stated:

> "For example, (1) a transfer of property by a corporation without a consideration, or one less than adequate and fully (*sic*) in money or money's worth, to B would constitute a gift from the stockholders of the corporation to B; * * *." (72nd Congress, 1st Session, Senate Report No. 665, p. 39; House Report No. 708, p. 28.)

The gift by the Unopco stockholders, made as it was, voluntarily and without consideration, was of the character which Congress at least supposed that it was exempting from the Income Tax and subjecting to the Gift Tax.

The Circuit Courts of Appeal have also considered the element of the donor's *intent* as controlling, *i.e.*, whether the payment was *intended* as a gift or as compensation. *Fisher* v. *Commissioner*, 59 F. (2d) 192, 193 (C. C. A. 2); *Bass* v. *Hawley*, 62 F. (2d) 721, 722-3 (C. C. A. 5).[6]

(b) The stipulation.

The stipulation of the parties in this case appears to us conclusive that all of the above-noted elements of a "gift" are present here:[7]

(1) The payment to petitioner was *voluntary*. There was no "legal or *other* obligation" on the part

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[6]The Board of Tax Appeals, however, made no finding as to what the intent of the donors in the instant case was.

[7]Nor is there any conflicting evidence.

of Universal, Unopco or the stockholders of either to make the payment (R. 40, 41).

(2) The payment to petitioner was *without consideration.* It was "not made or intended to be made by said Unopco Corporation or any of its stockholders as payment or compensation for any services rendered or to be rendered or for any consideration given or to be given by any of said employees, attorneys or experts [including petitioner] to said Unopco Corporation or to any of its stockholders" (R. 41).

(3) The payment to petitioner was *intended* to be a gift. Since it is stipulated that the payment was not intended "as payment or compensation for any services rendered or to be rendered or for any consideration given or to be given" to the donors (R. 41), and since the donors stated at the time that the payment was intended to be a gift (R. 43-49), the only possible conclusion is that the payment *was* intended to be a gift.

(c) The other facts.

The Commissioner and the Board itself agree that the case must be decided on the whole record and in the light "of all the evidence" (Board op. at R. 21).[8]

The most important consideration which we present to this Court is this: The evidence here is so comprehensively in favor of the petitioner that it is impossible to conceive a

[8]The opinion of the Board is discussed in detail in the Appendix hereto.

case of a payment to an employee which would be non-taxable if this payment be held taxable.

Here, the donor was not an employer, and did not even have the same economic interest as the employer (was not a holding company or affiliated with the employer). The payment was not even thought of or suggested until after all the economic interests between the donor-stockholder and the employing corporation had been finally and irrevocably severed. The language of Unopco's President both in suggesting the gifts to the stockholders, and in making them to the recepients,—language obviously entitled to great weight as having been made spontaneously and informally as part of the *res gestae,*—is consistent only with the theory that these were true gifts. Throughout, his expression is that the ex-employee is regarded as a part of the "family". If Judge Learned Hand's view is to prevail,—that in employment cases payments will be recognized as gifts only when the gift approximates or approaches that which ordinarily dictates gifts to relatives,—then where are we to find a more appropriate case for the operation of the rule than one in which the donees were at the time referred to as members of the "family"?

Even the minor *indicia,* recognized in the decided cases, here combine to favor the petitioners. No tax deduction was sought by the donors, either as individuals, or through the corporate medium that made the gift (the Unopco Corporation). Nor did Unopco rely on directors' action alone, as would have been appropriate if it had been discharging a corporate purpose of its own; but, the gifts being obviously outside the ordinary and proper course of its investment business, they were submitted to and ratified by the individual stockholders.

In effect, the whole government case has, in all of the arguments in the Circuit Courts of Appeal, come down to this: That in no case in an employer-employee relationship, is a gift to be recognized.

The course of argument has been that the Commissioner has first conceded that taxability is in this case placed upon the ground that the donors, although under no legal or other obligation whatsoever, and although receiving no legal or other consideration, yet *recognized* that the donees had rendered loyal services in the past, and that this fact of recognition was confirmed by the use in the corporate resolutions of the word "bonus". The word "bonus" in a corporate resolution is not of course conclusive that a payment to an employee is additional compensation rather than a gift. *Rogers* v. *Hill,* 289 U. S. 581-582. Moreover, the Board itself, in its opinion, recognizes that the language of the resolution is not controlling, citing a decision to that effect in *Levey* v. *Helvering,* 68 F. (2d) 401, affirming 26 B. T. A. 889 (in which, conversely, use of the word "gift" in a corporate resolution was held not conclusive that the payment was a gift).

And no employer-employee relationship would ever in the ordinary course of human affairs give rise to a subsequent gift by the employer to the employee, unless the factor of recognition was in some degree present. As a matter of fact, if the effect of recognition is to destroy donative intent and is to convert gifts into compensation, then few indeed will be the gifts even by blood relatives.

(d) The cases.

It is believed that there is nothing to be gained by an extended analysis of the conflicting decisions of various

Circuit Courts of Appeal upon the distinction between gifts and compensation. It was to resolve this conflict, presumably, that this Court granted certiorari.

The First, Fourth and Fifth Circuits have held that the distribution now before this Court was compensation and not a gift, with respect to other petitioners. *Walker* v. *Commissioner,* 88 F. (2d) 61 (C. C. A. 1); *Hall* v. *Commissioner,* 89 F. (2d) 441 (C. C. A. 4); *Simpkinson* v. *Commissioner,* 89 F. (2d) 397 (C. C. A. 5). Judge Morton dissented in the First Circuit, as did Judge Swan in the instant case in the Second Circuit. The decisions in the Fourth and Fifth Circuits were subsequent in time, and show on their faces that they were made with knowledge of the prior decisions in the First and Second Circuits.[9]

The Third, Sixth and Ninth Circuits have held somewhat similar distributions by corporations to be gifts and not compensation. *Jones* v. *Commissioner,* 31 F. (2d) 755 (C. C. A. 3); *Blair* v. *Rosseter,* 33 F. (2d) 286 (C. C. A. 9) *supra; Cunningham* v. *Commissioner,* 67 F. (2d) 205 (C. C. A. 3); *Lunsford* v. *Commissioner,* 62 F. (2d) 740 (C. C. A. 6).

In *Jones* v. *Commissioner,* the stockholders of a corporation sold their stock to third parties for $3,000,000. $300,000 of this amount was by previous agreement distributed to the officers and administrative staff of the corporation, who had been long employed by it, since it was felt that they would lose their positions by reason of change of ownership. The corporation had considered making this payment to its employees, but later the plan was

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[9]The opinions of the Circuit Courts of Appeal are discussed in detail in the Appendix hereto.

changed, since it was felt that the corporation could not legally make a gift. The officer in charge referred to the desirability of making the payment "in consideration of such a sudden termination of the business association and in recognition of the efforts and devotion of the officers and certain old employees of the companies over a long period of years". (10 B. T. A. 202, 204). The Circuit Court of Appeals stated that the payment was "in recognition of the past faithful work of the staff" (31 F. (2d) at p. 756), reversed the Board of Tax Appeals, and held that the payment was a gift and not compensation.

The case was a distinctly stronger one for the Commissioner than the present case, in that (1) the officers and old employees there suffered the detriment of losing their positions (whereas in our case those who had not previously terminated their employment, continued in the employ of Universal), and (2) the employer had itself considered making the payment (whereas in our case the suggestion that the payment be made never arose until after all relationship had been severed between the corporate employer and the paying shareholders).

In *Cunningham* v. *Commissioner,* the stock of a corporation had been purchased by Canadian interests and a new set of directors elected. The president voluntarily resigned. Thereupon, the board of directors made a payment of $15,000 to the president "in appreciation of Mr. Cunningham's excellent guidance of this corporation during the times of difficulty and depression". The Board of Tax Appeals held for the Commissioner and decided that the payment was compensation. The Circuit Court of Appeals for the Third Circuit reversed the Board of Tax Appeals and held that the payment was a gift.

In *Blair* v. *Rosseter,* a corporation, with full approval of its stockholders, made a payment of $50,000 to its president "as a gift in recognition of his able and successful direction of the affairs of the company through the past ten years". The corporation charged the payment to surplus account, and never made any attempt to deduct it. The Court held that the payment was a gift and not compensation for services.

In *Lunsford* v. *Commissioner,* a corporation made a payment of $50,000 to an employee of another corporation (as in the instant case) who had acted for that other corporation in connection with a transaction in which the donor corporation had purchased property. This payment was made with the assent of the employing corporation. Although it did not appear that the stockholders of the donor corporation had ratified the payment, the Court held that it was a gift.

Bass v. *Hawley,* 62 F. (2d) 721 (C .C. A. 5), was relied upon by the majority opinion in the Court below. In this case, a holding company sold the stock of the El Paso and Southwestern Railroad Company to the Southern Pacific in exchange for stock and bonds of the Southern Pacific. The holding company thus retained an indirect interest in the El Paso. A committee of the board of this holding company was appointed "to compensate employees". After the holding company had effected the exchange, its stockholders authorized its directors to pay "additional compensation" to officers and employees "in recognition of long and faithful service of the officers and employees of the Railroad". Some of the larger payments were divided between two taxable years. The recipients paid tax thereon. They later sued to recover these taxes on the ground that

the payments were gifts. The Court held that the payments were income and not gifts.[10] However, it seems clear that the stockholders authorized "additional compensation" and not gifts. Not only were the payments not called "gifts" at any time, but the donors, because of their indirect interest in the employer corporation, would benefit from the future services of the employees.

Other cases involving the question of whether payments by a corporation to its own employees[11] were a gift or were compensation have been decided on the basis of facts not appearing in the instant case. One or more of these facts has always been present: (1) the payor corporation has treated the payment as salary paid and deducted it as business expense in its income tax return; (2) the stockholders have not approved the payment by the corporation, and since the directors may not give away the assets of the corporation, a payment authorized merely by them has been held to be compensation; or (3) the courts have expressly found that there was consideration for the payment or an obligation to make it. In *Fisher* v. *Commissioner,* 59 F. (2d) 192 (C. C. A. 2); *Botchford* v. *Commissioner,* 81 F. (2d) 914 (C. C. A. 9); and *Anderson* v. *Commissioner,* 79 F. (2d) 979 (C. C. A. 2), aff'g 31 B. T. A. 197, the first

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[10]Other cases involving the same transaction that was under consideration in *Bass* v. *Hawley* are: *Barnes* v. *Commissioner,* 17 B. T. A. 1002; *Schumacher* v. *Commissioner;* 27 B. T. A. 895; *Schumacher* v. *U. S.,* 55 F. (2d). 1007 (Ct. Cls.).

[11]The instant case, of course, involves a payment to the employees of another corporation, not affiliated in any economic or business interest and having no community of interest with the corporation that made the gift.

two factors were alike present; in *Lougee* v. *Commissioner,* 63 F. (2d) 112 (C. C. A. 1), aff'g 26 B. T. A. 23, the first factor was present; in *Levey* v. *Helvering,* 68 F. (2d) 401 (App. D. C.), the second and third factors were present; in *Noel* v. *Parrott,* 15 F. (2d) 669 (C. C. A. 4), cert. den. 273 U. S. 754, the first and second factors were present, and the third factor was present in that the employees gave consideration by their efforts to bring about the sale of the stock itself; in *Davis* v. *Commissioner,* 81 F. (2d) 137 (C. C. A. 6), the Court found ample consideration in that the employees had remained in the employ of the corporation because of promises that they would be compensated beyond their salaries if they remained; and in *Weagant* v. *Bowers,* 57 F. (2d) 679 (C. C. A. 2), the corporation payment was in performance of the corporation's obligation to pay to the employee one-third of the profits from the sale of patents for his inventions.

In the instant case, on the other hand, none of the above factors is present, and there can be no doubt that the payment to petitioner was a gift since it was intended to be such, was made voluntarily, without legal or other obligation, and without consideration to the donor.

II

THE PAYMENT TO PETITIONER, BEING A GIFT, WAS NON-TAXABLE.

A. The theory of the majority opinion below is erroneous.

(1) The majority opinion in the Circuit Court of Appeals apparently proceeded upon the assumption that the

payment to petitioner was a "gift", but was, nevertheless, taxable compensation. Judge Learned Hand stated (R. 64):

> "Such payments may be at once 'gifts' under § 22, subdivision (b)(3), and 'compensation for personal service' under subdivision (a)."

We understand the rule laid down by the majority opinion to be this: (a) That payments to present or past employees which fall within the category of *gifts*, may be of either one of two classes (1) gifts dictated by a belief on the part of the giver that prior services had not been equitably compensated, not necessarily because inequitable at the time of compensation, but also because subsequent events have proved that it would now be inequitable not to add to that prior compensation; and (2) gifts dictated by pure love and affection for the employee as an individual quite regardless of the fact that he or she was or ever had been an employee; and (b) that gifts of the first class are taxable to the recipients, and those of the second class are not.

As Congress has provided (in § 22(b) of the Revenue Act of 1928) that all gifts are exempt from tax, this judicial division into taxable gifts and non-taxable gifts is unwarranted.

(2) The majority opinion below further attempted to justify its position by stating that although § 22(b) of the Revenue Act is entitled "Exclusions", this must have been merely out of abundant caution, since certain items specified therein, such as life insurance, compensation for sickness or injury and "inheritances" could "by no possibility" be income under § 22(a). The argument is illogical on its face; one may as well say that a statute taxing foreigners,

but excluding inhabitants of Canada and Alaska, must be construed to include Canadians because Alaskans would not on a true analysis be deemed foreigners.

But, assuming that the argument had any validity, it does not apply to gifts because there are real doubts as to whether certain types of gifts are income. As Judge Learned Hand, the writer of the majority opinion, himself said in *Rice* v. *Eisner,* 16 F. (2d) 358, 360 (C. C. A. 2):

> "The exemption in all the statutes of the corpus of gifts and bequests shows that in the minds of those who drew the acts it was thought open to question whether even this might not be considered income."

And this Court refused to decide whether life insurance proceeds were income, in *United States* v. *Supplee-Biddle Hardware Co.,* 265 U. S. 189. Life insurance proceeds paid to a corporation have been held to be "earnings and profits". *Cummings* v. *Commissioner,* 73 F. (2d) 477 (C. C. A. 1).

(3) The Court below further attempted to justify its position by citing *Ream* v. *Bowers,* 22 F. (2d) 465 (C. C. A. 2) and *Rose* v. *Grant,* 39 F. (2d) 338 (C. C. A. 5) for the proposition that bequests may be included in gross income under some circumstances. These cases, on the contrary, stand for the proposition that a "legacy" conditioned on performance is not a bequest at all. As Judge Augustus N. Hand said for the same Court in *Ream* v. *Bowers, supra:*

> "We agree with the opinion of Judge Hazel in the District Court that the $50,000 was directed to be paid for personal services, and nothing else, was not a bequest, conditional or otherwise, and consequently was taxable as income" (p. 468).

And this Court, in *United States* v. *Merriam,* 263 U. S. 179, 186-7, has very clearly pointed out that where what is in name a "legacy" is, in reality, a provision for compensation for services to be rendered, it ceases altogether to be a bequest and becomes compensation.

(4) *The Old Colony Trust Case,* 279 U. S. 716.

The Court below then cited *Old Colony Trust Co.* v. *Commissioner,* 279 U. S. 716, for the proposition that a gift may also be "compensation for personal service" and taxable as such. The compensation there was earned, although there was no legal obligation to pay it. And the relevant proposition stated by this Court was merely that lack of legal obligation did not of itself convert compensation into a gift. This Court was careful to point out that there *was* consideration for the payment in question, and certainly did not hold that a voluntary payment *without consideration* was not a gift.

In that case, a resolution providing for the payment of the employee's income taxes had been passed more than one year before the taxable year in question, so that, for that particular year, the employee entered upon his duties under the express agreement that his income taxes would be paid by his employer. This Court showed clearly by its statements, 279 U. S. at pages 729 and 730, that there was a valuable consideration for the payment of the income taxes, and that the payment was, in effect, the equivalent of additional salary:

> "The certificate shows that the taxes were imposed upon the employee, that the taxes were actually paid by the employer and that the employee entered upon his duties in the years in question

> under the express agreement that his income taxes would be paid by his employer. This is evidenced by the terms of the resolution passed August 3, 1916, more than one year prior to the year in which the taxes were imposed. The taxes were paid upon a valuable consideration, namely, the services rendered by the employee and as part of the compensation therefor. We think therefore that the payment constituted income to the employee.
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> * * * * * * * *
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> "Nor can it be argued that the payment of the tax in No. 130 was a gift. The payment for services, even though entirely voluntary, was nevertheless compensation within the statute."

Had the payment been a voluntary one *and without consideration,* it must necessarily have been a gift.

B. Even if the theory of the majority opinion below be correct, the payment to petitioner was not taxable.

The theory of the majority opinion below apparently was that the payment to petitioner was a gift made pursuant to a *moral* obligation—a feeling that the services deserved more than they had received—and therefore was more than "an unconstrained act of affection or regard".

Even if one assume that the theory is correct that a gift is taxable if dictated by any motive other than "unconstrained * * * affection or regard", the facts necessary to its application in this case were either expressly stipulated out of the case by the parties, or were not found by the Board.

It is stipulated that the payment was not made pursuant to any moral obligation, that there was no "legal or *other*

obligation" to make the payment on the part of Universal, Unopco or the stockholders of either (R. 40, 41). It follows that, obligation being absent, the gift was "an unconstrained act."

Was it an act "of affection or regard"? We have shown that it was made to the recipients as if "members of the family" of the donors. And the Board did not find that the donors had felt that the petitioner's services to Universal deserved more than he had received, or that the donors had any motive other than "affection or regard". Indeed, there is nothing in the record upon which to base such a finding.

Thus, even upon the theory enunciated by the majority opinion below, the payment in question was a non-taxable gift and was not compensation.

C. The English cases apply *a fortiori* in favor of the petitioner.

The theory of the majority opinion below must be that the mere facts of past employment or association in business and of recognition of past services are sufficient to justify a holding that a gift is taxable compensation.

As has been pointed out above, § 22(b)(3) comprehensively excludes all "gifts" from gross income and exempts them from income tax. It does not merely exclude "personal gifts" or "gifts made solely because of friendship"; but all types of gifts are exempt.

The question as to whether voluntary payments by a corporation or its stockholders to employees were taxable income has arisen on several occasions in Great Britain in the administration of its income tax law. Even though the British statute does not contain an express provision

excluding "gifts" from gross income, the English cases have held that a voluntary lump sum payment made by a corporation, or its stockholders, to the officers or employees of the corporation, cannot be "profits * * * accruing by reason of * * * offices, employments, or pensions" (corresponding to the phrase in our Revenue Acts: "compensation for personal service") merely because the payment may be in recognition of past services. The mere facts that the donees have rendered services to the donor, that the payment is made to the donees "in recognition of past services", and that the payment would not have been made but for the past services, have not been considered sufficient to make the tax payable.

In *Beynon* v. *Thorpe* [1928] 97 L. J. K. B. 705, 44 T. L. R. 610, 14 Tax Cas. 1, a corporation awarded a pension of £5,000 per year to a retired director. After two years' time, this pension was rescinded and the director was given a lump sum of £5,000 which the resolution stated was voted to him, not because he was a director, but "as a personal gift". In holding that the payment was not "profits and earnings of whatever value arising from employments", Judge Rowlatt said:

> "Now the question is whether this ceases to be a mere gift because what has led to it is a past employment, an employment which has ceased. * * * Well, it seems to me that is a complete fallacy. It is nothing but a gift moved by the remembrance of past services already efficiently remunerated as services in themselves; it is merely a gift moved by that sort of gratitude or that sort of moral obligation if you please[12]: it is merely a gift of that kind. In

[12]Yet in our case it is even stipulated that there was no moral obligation.

> this case it happens to be very large; in many cases it is very small, but in all cases it seems to me, whether it is a large gift like this or whether it is a small gift to a humble servant, they are exactly on the same footing as gifts which are made to a child or gifts which are made to any other person whom the giver thinks he ought to supply with funds for one reason or another; and as the Lord President in Scotland [*Duncan's Executors* v. *Farmer,* 5 T. C. 417] points out it is only a matter of history that the feeling between the parties which has generated the gift arises out of an employment" (pp. 13, 14 of 14 Tax. Cas.).

In *Cowan* v. *Seymour* [1920] 1 K. B. 500, 7 Tax Cas. 372, reversing [1919] 2 K. B. 146, the shareholders of a corporation which had been liquidated made a payment of about £1,000 from the assets of the corporation to the secretary and chairman of the corporation. The Commissioners of Taxes and the High Court of Justice (King's Bench Division) had held that the payment was taxable. The Court of Appeal, however, reversed and held that the payment was a mere gift. Lord Sterndale said:

> "But the fact that the office is at an end is a fact of very, very great weight, and when you add to that that the payment is made, not by the employer, because it was not made and could not be made here by the company, which was the employer, but is made by other persons—in this Case it was by the shareholders individually—the facts still more point to it not being a payment for services, or a profit accruing by reason of the office.
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> * * * * * * * *
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> "But the difficulty I have had is this, whether this is not a question of fact upon which the Commis-

sioners either have found or ought to find, and whether the Case ought not to go back to them. * * *

"But although, with great doubt, I have come to the conclusion that I ought to deal with the facts, and the facts are sufficiently stated for me to deal with them, I think we must take this Case as stating the facts which appear upon it and nothing else, and that the Court ought not to speculate as to whether there might not be something in the relations of these parties and this company with other companies which might throw a different light upon the transaction. I think we must consider for our purpose the facts upon the Case as whole facts, and looking at those as the whole facts I find, as I have said, the very important factor of the office having terminated at present, and the other almost equally important factor that the payment is made, not by the employers, but by somebody else, though in this Case perhaps that is not quite so important, as there is a close connection between the employer, the company, and the persons who gave the money; and the inference, therefore, is that this was money paid to him as a testimonial or tribute for what he had done after his services were over and not a payment for those services. And I think on the facts as they stand the direction should have been given that that is an inference of fact which must be drawn. That being so, I think I am entitled to say that if that is to be, as it is, a question of fact, on the facts as stated only one inference could be drawn, and therefore the appeal ought to succeed, and I suppose will succeed with costs here and below" (pp. 379-380 of 7 Tax Cas.).

In *Chibbett* v. *Joseph Robinson & Sons* [1924] 19 T. L. R. 195, 9 Tax Cas. 48, a firm of ship managers had been employed in that capacity by a steamship corporation.

The corporation went into voluntary liquidation in 1918 and in general meeting authorized the liquidator to distribute £50,000 to the ship managers "as compensation for loss of office". As a matter of fact, the ship managers were rehired by the reorganized corporation.

The High Court of Justice (King's Bench Division) held that the payment was not income, but a mere gift. Judge Rowlatt said:

> "This case is not very unlike the case of *Cowan* v. *Seymour* [7 T. C. 372], where officers of a company who had served for nothing during the life of the company and in the winding up, after the winding up were given by the shareholders, out of their divisible profits, a gift. It was held in the Court of Appeal that there was no evidence which would justify the Commissioners in holding that that was a profit of the offices of these gentlemen [p. 60 of 9 Tax Cas.].
>
> * * * * * * * *
>
> The company as then constituted certainly came to an end, and when it came to an end they gave this solatium to this firm out of their abundant prosperity, once for all, not because of anything they were doing, but really very much, I think, as the Master of the Rolls puts it, as a testimonial for what they had done in the past in their office which had now terminated.
>
> "Of course it is true that it is a trade receipt in this sense, that if these people had not been managers they never would have got it. It was not a gift to them as individuals or anything of that sort; it was because they were people of this kind" (p. 62 of 9 Tax Cas.).

The House of Lords considered this question in *Reed* v. *Seymour*,[13] [1927] A. C. 554, 11 Tax Cas. 625. A cricket club granted a benefit match to a professional cricketer shortly before his retirement from its employ. The King's Bench Division held that this was a donation not subject to income tax. This was reversed by the Court of Appeal in a 2 to 1 decision. The House of Lords, however, restored the decision of the King's Bench Division, and held that the payment was a gift and not income. Viscount Cave, *L. C.*, said:

> "The question to be answered is, as Mr. Justice Rowlatt put it, 'Is it in the end a personal gift or is it remuneration?' If the latter, it is subject to the tax; if the former, it is not.
>
> "Applying this test, I do not doubt that in the present case the net proceeds of the benefit match should be regarded as a personal gift and not as income from the Appellant's employment. The terms of his employment did not entitle him to a benefit, though they provided that if a benefit were granted the Committee of the Club should have a voice in the application of the proceeds. A benefit is not usually given early in a cricketer's career, but rather towards its close, and in order to provide an endowment for him on retirement; and, except in a very special case, it is not granted more than once. Its purpose is not to encourage the cricketer to further exertions, but to express the gratitude of his employers and of the cricket-loving public for what he has already done and their appreciation of his personal qualities" (11 Tax Cas. at pp. 646-7).

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[13]The opinions in the King's Bench Division and in the Court of Appeal are reported [1926] 1 K. B. 588, and [1927] 1 K. B. 90, respectively.

Lord Phillimore said:

> "My Lords, I do not feel compelled by any of these authorities to hold that an employer cannot make a solitary gift to his employee without rendering the gift liable to taxation under Schedule E. Nor do I think it matters that the gift is made during the period of service and not after its termination, or that it is made in respect of good, faithful and valuable service" (11 Tax Cas. at p. 655).

Since the English cases were decided under an income tax law which does not in terms exclude gifts, their reasoning should have *a fortiori* application in favor of the petitioner.

III

WHETHER THE PAYMENT TO PETITIONER WAS A GIFT OR WAS COMPENSATION IS A QUESTION OF LAW, OR AT LEAST A MIXED QUESTION OF FACT AND LAW, TO BE DETERMINED BY THIS COURT.

The majority opinion below takes the position that the decision of the Board of Tax Appeals that the payment was compensation rather than a gift was final and cannot be reviewed on appeal (R. 67).

However, only the Board's findings of *primary* fact can ever be final. *Helvering* v. *Tex-Penn Oil Company,* 300 U. S. 481, *supra; Helvering* v. *Rankin,* 295 U. S. 123, 131, *supra.* Petitioner does not contest the findings of primary fact by the Board. What petitioner does contest,

is the ultimate finding that the payment was compensation under §22(a) rather than a "gift" under §22(b)(3). Such an ultimate finding is "a conclusion of law or at least a determination of a mixed question of law and fact. * * * It is subject to judicial review and, on such review, the court may substitute its judgment for that of the board." *Helvering* v. *Tex-Penn Oil Co.*, 300 U. S. 481, at 491.

The above rule is particularly applicable where the evidentiary facts are undisputed, as they are in this case. *Washburn* v. *Commissioner*, 51 F. (2d) 949, 951 (C. C. A. 8); *Burnet* v. *Lexington Ice & Coal Co.*, 62 F. (2d) 906, 909 (C. C. A. 4).

Applying these principles to the present case, it is apparent that the Board's conclusion:

> "From a careful consideration of all the evidence before us, we conclude that the payments made by Unopco to the petitioners and others were additional compensation in consideration of services rendered to Universal and were not tax-free gifts." (R. 21)

is a mixed conclusion of law and fact. "Gift" and "compensation" are words of law, being the statutory phrases; yet they are likewise expressive of ultimate facts.

The ruling of this Court in the *Tex-Penn Oil* case at the last Term appears to us to have finally clarified and settled the law to the effect that this type of ruling must be subject to full court review.

In the present case, the Board made no findings between this ultimate conclusion in statutory language and the findings of primary fact. The ultimate question in this case is one of law: Whether the uncontraverted testimony and

findings of primary fact (which we accept) support the inferences and conclusions of the Board.

It is respectfully submitted that the decree of the Court below should be reversed.

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APPENDIX

Analysis of Opinions Below

(1) *Board of Tax Appeals* (unreported, R. 9).

After completing its review of the cases which hold that similar payments were gifts, and not taxable, the Board attempts to dispose of them by saying that (R. 16):

> "It does not follow because a *corporation* is not under any *legal* obligation to pay an amount which it does pay to an officer or an employee or one who has rendered services that the amount is not compensation but a tax-free gift." (Italics ours.)

We agree. But the sentence fails to meet this case. First, the gift was not made by the employing corporation. Second, it is stipulated, not merely that both the employer and the donor were under no legal obligation, but that neither of them was under any obligation of any character, and that the donees had rendered no services to the donors. And further the question whether the donor is under an obligation is only one of the many considerations recognized by the decided cases to be applicable.

The Board then turns to the authorities which found that, on the facts of the particular cases presented, the payments in question were not gifts. First place is given to *Noel* v. *Parrott,* 15 F. (2d) 669 (C. C. A. 4), and of this the Board says (R. 16):

> "The facts in the instant case are similar to those in *Noel* v. *Parrott, supra.*"

In truth, it is difficult to conceive of a state of facts more dissimilar. (a) In *Noel* v. *Parrott* the payment was made by the corporation which employed the recipients; in this case, it was made by a company which not merely had not employed them but had no common economic interest (by

affiliation or otherwise) in the corporation that employed them. (b) There, the payment to the employees was stipulated as a term and condition to the agreement of sale of the stock; here, the gift was never even thought of until three days after the sale. (c) There, the gift was to an actual employee; here, the recipients included professors in universities who had occasionally been retained as outside experts in independent patent suits, and persons who had long since left the employment, including even a person who had never been employed at all (sister of an employee who had been killed in an accident in line of duty 12 years before). (d) There, the payment was never referred to as "a gift"; here, the president of the donor invariably called the payments "gifts", recommending it to the stockholders as a "gift or honorarium" and offering it to the recipients sometimes as a "slice of bacon", and again as a "slice of cake", "because we regard you as one of the family". (e) There, consideration was given (1) by continued services up to the time of the sale in reliance upon the undertaking to plaintiff, (2) aid in making the sale itself, and (3) the detriment suffered in losing the job; here, none of those things was present, as the recipients (1) had no promise or indication that such gift was to be made, (2) had no part in effecting the sale, and (3) kept their jobs. (f) There, there was a moral obligation to pay faithful employees because they were losing their jobs; here, it was stipulated that there was no "legal or other obligation" to make the payment. (g) There, the payment was charged on the paying corporation's books to "salary account"; here, it was charged to "surplus account". (h) There, an income tax deduction was claimed by the paying corporation; here, no income tax deduction was claimed either by the employing corporation or by the paying corporation, or by any stockholder.

After reviewing the cases in the same class as *Noel* v. *Parrott,* and making reference to *some* of the distinctions

from those cases asserted by us, the Board answers (R. 19):

> "It is apparent, however, that in making the distribution Unopco recognized and assumed the obligations of Universal to those officers and employees."

This again ignores the stipulation that neither Unopco nor Universal had any obligation, legal or otherwise. There was no obligation of Universal to recognize or assume.

Next, after referring to the resolutions, the Board bluntly says:

> "Unopco was to all intents and purposes a continuation of Universal under another name" (R. 19).

This is not so at all. The exact contrary is stipulated (R. 31). Universal continued its own patent-licensing business, just as it had done before. Unopco did not continue the business of Universal; it was a pure investment company.

The Board then suggests that "the situation was similar to that in *Bass* v. *Hawley*" and related cases (R. 19). In fact, the situation was wholly dissimilar, as in those cases the new company (corresponding to Unopco) indirectly acquired stock of the old company (corresponding to Universal) so that in fact there was a unity of economic interest. Here, the Universal stock was acquired by entirely different parties *from* the stockholders of Unopco.

The Board's opinion then refers (R. 19-20) to the testimony of the Universal attorney in this proceeding; but the only apparent significance in this was that it establishes beyond dispute that the matter of the gift was not thought of until a time later than the complete severance of all relations between the donors and the employing corporation.

The Board's opinion next reviews the language of the resolution of the Board of Directors and stockholders of Unopco (R. 20). Referring to the use of the words "bonus" and "in recognition of the valuable and loyal serv-

ices" in the resolution, the Board says that such use "strongly indicates" that the payments were intended as compensation for past services rendered to Universal. This is absolutely the only evidence to support the government position. In the body of the brief, we have explained why these phrases cannot be made conclusive as against all other testimony. The important points are two: (1) that the Board itself admits that the case must be decided on all the facts and not on the resolution alone; and (2) that, construing the resolution alone, the word "bonus" is by no means inconsistent with the idea of a gift, and the words "recognition of former valuable services" only establish a fact [recognition] which is present in absolutely every case of employer and employee; wherefore a decision against the taxpayer based on this phrase is in fact a decision that there never can be a gift to a past or present employee which will not be construed for tax purposes to be not a gift.

Moreover, that the resolution is not controlling, is recognized by the Board itself in its citation of *Levey* v. *Helvering,* 68 F. (2d) 401 (App. D. C.), affirming 26 B. T. A. 889, in which the word "gift" in a corporate resolution was held not conclusive that the payment was a gift. The principle must apply reciprocally, and the words of the resolution in this case be held not conclusive.

Yet the Board uses *Levey* v. *Helvering* as an argument to reject all the evidence of the simultaneous statements made by the individual (Mr. Halle) who proposed the gifts and to whom was entrusted the privilege of delivering them to the recipients (R. 21). Throughout his letters (R. 43-49), he referred to them as gifts and used like appropriate language. His phrases cannot be ignored on the authority of *Levey* v. *Helvering,* for that case simply stands for the proposition that a self-serving expression in a corporate resolution cannot deprive the government of taxes. It certainly does not stand for the proposition that one must ignore contemporaneous expressions which have the ring

of spontaneity, and constitute the best evidence of the true intention of the donors. To rule that certain evidence is not conclusive is quite a different thing from ruling that it is to be ignored.

Finally, the Board attempts, by citing *Bass* v. *Hawley,* to dispose of our argument that no deduction was taken by the donors (R. 21). But the *Bass* case says that the payor there "might have overlooked or waived his right to deduct"; whereas, in this case, it is expressly proved (R. 33) that Universal discussed the possibility of taking a tax deduction and rejected it because it did not believe it was entitled to a deduction. Of course, this is not conclusive against the government; but it is not fair to reject it as one of the *indicia* in favor of the taxpayer, when it must clearly be recognized that contrary action by Universal would have been advanced by the Commissioner as a most potent argument against the taxpayer. See, for example, the dissenting opinion of Judge Morton in the First Circuit case of *Walker* v. *Commissioner,* 88 F. (2d) 61.

(2) *Second Circuit* (88 F. (2d) 646, R. 63).

Judge Learned Hand, in the majority opinion, states that payments made by Unopco Corporation can be both "gifts" under §22(b)(3) and "compensation for personal service" under §22(a). This statement is manifestly contrary to the wording of the statute, which excludes "gifts" from the operation of §22(a).

The majority opinion then lays down the test to be followed by saying that when the donor is under no legal sanction to make the payment, the decision as to whether the payment is compensatory must depend upon his intent or motive. If, it argues, the payment be made by an employer to an old employee, and the employer feels that the employee has been paid in the past the full measure of anything he was "entitled to" either legally or morally, then the gift does not pay for the services and is not compensation. If,

however, the employer makes a payment to an employee with the feeling that his services have deserved more than they have received, then the gift pays for the services and is more than an "unconstrained act of affection or regard". It states that this latter type of gift is taxable. However, there is nothing in the record to show that the donors in this case felt that the employees had not been compensated to the full measure of anything that they were "entitled to". Indeed, it is stipulated that there was no "legal or other obligation" to make the payments on the part of Universal, Unopco or the stockholders of either. Judge Learned Hand's test, if applied to the facts of this case, would therefore make the payment here involved a non-taxable gift, even on his own theory.

Judge Learned Hand then states that the use of the words "honorarium" and "bonus" is particularly significant as showing that the payment paid for the services. His construction of the word "honorarium" is erroneous. The Third Circuit, in *Cunningham* v. *Commissioner,* 67 F. (2d) 205, uses it as a synonym for "gift".* The word "bonus" is clearly a word which may denote a "gift". This Court, in *Rogers* v. *Hill,* 289 U. S. 582, 591-2, held so-called "bonuses" to corporate officers to be gifts which it was not in the power of the directors to make. In any event, the contemporary statements referring to these distributions as gifts resolve any ambiguity as to the nature of the transaction.

The majority opinion then states that the decision of the Board of Tax Appeals is final in any event since its conclusion was not beyond any reasonable inference from the evidence. But the only real evidence of the intent of the

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*"The derivation of the word 'honorarium', as given by The Century Dictionary and Cyclopedia, is as follows:

> '[L. *honorarium* (sc. *donum*), a present made on being admitted to a post of honor, neut. of *honorarius,* honorary: see honorary]'."

donors in making the payment is contained in the letters to certain of the recipients in which they are referred to as belonging to the "family" and the payment is said to be in appreciation of the "association throughout the years" (R. 43-49). Therefore, the only evidence points to the conclusion that the payments were not only pursuant to no moral obligation and for no consideration, but that they were an act of "affection or regard".

Judge Swan, in his dissenting opinion, points out that the decision of the Board of Tax Appeals that the payments in question "were additional compensation in consideration of services rendered to Universal and were not tax-free gifts" is not final. The Board of Tax Appeals, he states, made no finding that the payments were intended as additional compensation. He points out that it was stipulated that the payments were not so intended.

Judge Swan states that the facts indicate that the shareholders of Unopco "were moved to an act of 'spontaneous generosity', rather than actuated by a sense of moral obligation to pay for services, inadequately compensated in the past". He also notes that the stockholders of Unopco could receive no possible benefit from payments to former or present employees of Universal.

(3) *First Circuit* (*Walker* v. *Commissioner,* 88 F. (2d) 61).

Judge Bingham, in the majority opinion, lays down the rule that whether a payment shall be deemed taxable compensation or a gift depends upon the intention of the parties, and particularly that of the employer, to be determined by the facts and circumstances surrounding the transaction. He says that where an employee, although he has been paid his agreed salary, is given an additional sum or sums by his employer, this raises a strong presumption that the payments were compensation for services rendered. However, this entirely overlooks the fact that the payments in this

case were not made by the employer, but by an independent corporation. It also disregards the stipulation that the payments were not made as compensation for any services rendered to the donors.

The majority opinion then states that the vote of the directors and stockholders of Unopco was to grant a "bonus", which imports compensation, and Universal was in the habit of giving bonuses to its employees. But the fact that Universal was in the habit of giving bonuses to its employees is beside the point because this payment was not made by Universal. Moreover, the fact that Universal had already given bonuses for the year 1930 is indicative that the payments here in question were of a different nature.

The majority opinion states that the contemporary letters and statements of the president that the payment was a gift merely present a case of conflicting evidence. But all the evidence is in harmony with these contemporary letters; there *is* no conflicting evidence.

And Judge Morton, in his dissenting opinion, points out that there was no evidence before the Board of Tax Appeals warranting the finding that the payment was compensation. He points out that the taxpayer had never been employed by Unopco Corporation in any capacity, and that the payment in question was treated as a gift and was so approved by the stockholders as well as the directors of Unopco.

(4) *Fourth Circuit* (*Hall* v. *Commissioner,* 89 F. (2d) 441).

The opinion states that the finding of the Board of Tax Appeals is amply supported by the testimony in that Universal had made large profits and its original stockholders felt that additional compensation should be paid to those who had aided in the making of the profits. But there is no evidence at all that the original stockholders felt

that additional compensation should be paid, and the Court's statement to that effect completely disregards the stipulation that the payments were not made or intended to be made as compensation for any services rendered to the donors. The opinion then goes on to state that it makes no difference that the payment was made from the assets of Unopco after the transfer instead of from the assets of Universal before the transfer. This completely disregards the stipulation that the payment was not *thought of* until after the transfer had taken place

The opinion also states that the decision of the Board of Tax Appeals is supported by substantial evidence which, as above noted, is not borne out by a reading of the stipulation and the findings of fact.

(5) *Fifth Circuit* (*Simpkinson* v. *Commissioner,* 89 F. (2d) 397).

The Court states that, in a broad sense, a benefit done another without legal obligation is a gift, but construing together the provisions of the income tax statute, when money is paid to a present or former employee in consideration of his services, he receives it as compensation for services. This statement of the Court completely disregards the stipulation that the payments were not made or intended to be made as compensation for any services rendered to the donors.

The opinion then states that the formal resolutions, both of the directors and of the stockholders, called the payments a "bonus" paid in recognition of "valuable and loyal services". The Court takes the position that the wording of the resolution is conclusive, is the best evidence of the corporate act and intention, and that the contemporary statements of the president of the corporation made at the meetings of the directors and stockholders and in presenting the donations must be disregarded. The Court here stands alone, because all the other decisions upon the

question recognize that all the facts and circumstances surrounding the payment must be taken into consideration. Certainly the use of the equivocal word "bonus" in the corporate resolution cannot be conclusive.

The Court finally bases its decision upon the fact that the payment from the assets of Unopco was in recognition of "a felt moral obligation of the old business". This statement is expressly contrary to the stipulation and the findings of fact of the Board that Universal, Unopco and the stockholders of both corporations were under no "legal or other obligation" to make the payment.

In effect, the Fifth Circuit comes the closest to actually saying what we believe that all of the majority opinions were in effect thinking, viz., that there could be no case of gifts to former employees which could be non-taxable, for in effect there must in every such case be some "recognition" in the mind of the donor of the former employer-employee relationship.

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No. [redacted] 15

In the Supreme Court of the United States

October Term, 1948

[redacted]

Petitioner,

vs.

[redacted]

Respondent.

[redacted]

In the Supreme Court of the United States

OCTOBER TERM, 1936

No. 830

ARTHUR G. BOGARDUS, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Board of Tax Appeals (R. 21–34) is not reported. The opinion and dissenting opinion of the Circuit Court of Appeals (R. 92–96, 97–98) are not yet reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 15, 1937 (R. 113). The petition for writ of certiorari was filed March 20, 1937. The jurisdiction of this Court is invoked under

Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the court below erred in affirming the determination of the Board of Tax Appeals that the sum of $10,000 received by the taxpayer in 1931 constituted compensation for personal services rather than a gift.

STATUTE INVOLVED

Revenue Act of 1928, c. 852, 45 Stat. 791:

> SEC. 22. GROSS INCOME.
>
> (a) *General definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever.
>
> (b) *Exclusions from gross income.*—The following items shall not be included in gross income and shall be exempt from taxation under this title:
>
> * * * * *
>
> (3) *Gifts, bequests, and devises.*—The value of property acquired by gift, bequest, devise, or inheritance (but the income from

such property shall be included in gross income);

* * * * *

STATEMENT

The facts found by the Board are as follows (R. 16–21):

Petitioner had been employed by the Universal Oil Products Company, herein referred to as Universal (R. 16). Universal was a South Dakota corporation organized in 1914. Its only asset in the beginning was an application for a patent on a process for refining petroleum and manufacturing gasoline. Later, it acquired other patents and licensed them to various producers on a royalty basis. It received its first royalty payments of a few thousand dollars in 1922. From that time its business improved rapidly, and by 1929 its royalties amounted to about $8,000,000, and in 1930 to about $9,000,000. Early in the year 1931, all Universal stock was sold to the United Gasoline Corporation for $25,000,000. (R. 16–17.)

In anticipation of this sale, the Unopco Corporation had been organized for the purpose of taking over those assets of Universal which were to be excluded from the sale. Accordingly, and under the terms of the sale agreement of January 2, 1931, cash, securities, accounts receivable, etc., of a value of approximately $4,100,000 were transferred to the Unopco Corporation. (R. 17.)

The Unopco Corporation had been engaged in no business activities up to the time of the sale of

the Universal stock, and since the sale, its only business has been the investment and management of the assets acquired through the sale agreement (R. 17). At the time the sale of the Universal stock was about to be consummated, the shares of stock of Universal and of Unopco Corporation were owned by the same stockholders, with the same proportionate holdings (R. 17). Universal continued to carry on the same business after the stock had been acquired by the United Gasoline Corporation. The stockholders in Unopco Corporation held no stock in Universal nor in the United Gasoline Corporation after the sale was consummated. (R. 17–18.)

A few days after the sale of Universal stock, the stockholders of Unopco Corporation, who were the former stockholders of Universal, held a meeting at which it was proposed that they show their appreciation for the loyalty and support of some of the employees of Universal by making them a "gift" or "honorarium" (R. 17–18). A resolution was formally adopted at a meeting of the board of directors of Unopco Corporation on January 9, 1931, and by the stockholders on January 10, 1931. The latter resolution was as follows (R. 18–19):

> RESOLVED, that the following recommendations made by the Board of Directors to the stockholders of this Corporation in the meeting of the Board of Directors held on January 9, 1931, viz.:
>
> That the sum of Six Hundred Seven Thousand Five Hundred Dollars ($607,500.)

be appropriated, paid and distributed as a bonus to sixty-four (64) former and present employees, attorneys and experts of Universal Oil Products Company (the corporation of that name referred to in the meeting of this Corporation held on the fifth and sixth days of January, 1931), in recognition of the valuable and loyal services of said employees, attorneys and experts to said Universal Oil Products Company; such sum to be distributed among said sixty-four (64) employees, attorneys and experts in such amounts to each employee, attorney and expert as the Board of Directors of this corporation shall determine;

be and the same are hereby in all things approved; and

RESOLVED FURTHER, that this Corporation do appropriate, pay and distribute the said sum of Six Hundred Seven Thousand Five Hundred Dollars ($607,500) as a bonus to sixty-four (64) former and present employees, attorneys and experts of said Universal Oil Products Company; in recognition of the valuable and loyal services of said employees, attorneys and experts to said Universal Oil Products Company; said sum to be distributed among said sixty-four (64) employees, attorneys and experts in such amounts to each employee, attorney and expert, as the Board of Directors of this Corporation shall determine.

Thereafter, a list of those who were to receive the payments authorized by the above resolution was prepared by the officers of Unopco Corporation. The payments ranged in amount from $500 to $100,000, and those receiving checks were told by the president that the payments were gifts from the stockholders of the corporation and need not be reported in income tax returns. (R. 19–20.) None of the recipients was ever employed by Unopco Corporation, nor by any of the former stockholders of Universal (R. 62–63). It was stipulated that neither Unopco Corporation nor any of its stockholders, nor the stockholders of Universal, was at any time under any legal or other obligation to pay the recipients any salary, compensation, or consideration of any kind (R. 64). Neither Unopco Corporation, Universal, United Gasoline Corporation, nor any of the stockholders of those corporations ever made or claimed any deduction for Federal income tax purposes of the payments made to the taxpayer and others. In the books of Unopco Corporation the payments were charged to surplus account in January 1931. (R. 20.)

Petitioner received $10,000 pursuant to the corporate resolution of January 10, 1931 (R. 20). The Commissioner of Internal Revenue treated the amount as compensation subject to tax (R. 7–10). The Board agreed with the Commissioner, and, on the appeal of petitioner, the Circuit Court of Appeals affirmed the Board's determination.

ARGUMENT

The Board of Tax Appeals decided, after reviewing the evidence, that "the payments made by Unopco to the petitioners and others were additional compensation in consideration of services rendered to Universal and were not tax-free gifts" (R. 33). It is the Board's function to weigh the evidence and declare the result, and, if there is substantial evidence to support the Board's conclusion, it must be accepted. *Elmhurst Cemetery Co. of Joliet* v. *Commissioner,* No. 255, October Term 1936, decided February 1, 1937. The court below said (R. 96): "The answer here is indeed doubtful, but on the whole we should have decided with the Board, had the decision been ours." But even if it had disagreed with the Board's conclusion, the court below would have had no power to substitute its own judgment concerning the facts for that of the Board, inasmuch as there was substantial evidence to support the latter's conclusion. *Helvering* v. *Rankin,* 295 U. S. 123, 131.

The evidence shows, as more fully set out in the statement, that on January 10, 1931, the stockholders of Unopco Corporation adopted the resolution approved by its board of directors the day before, that $607,500 be appropriated and distributed as a bonus to sixty-four persons, among whom was petitioner, in recognition of the valuable and loyal services they had rendered to Universal. Petitioner in 1931 received $10,000 of the sum appropriated. It further appears that Universal had

previously given bonuses to its employees, and that petitioner had received a bonus of $2,000 in 1930 (R. 77). This evidence warranted the Board's conclusion that the payments were taxable compensation received in recognition of services rendered.

In the case of another who participated in the same distribution made by the Unopco Corporation as is here involved, the Circuit Court of Appeals for the First Circuit said that though the evidence was conflicting, the conflict had been determined by the Board and its determination was final. *Walker* v. *Commissioner,* decided February 12, 1937, not officially reported but found in Vol I, Prentice-Hall, Federal Tax Service, 1937, Par. 1191. In still another case, *William F. Hall* v. *Commissioner,* unreported, involving another participant in this distribution by the Unopco Corporation, the Circuit Court of Appeals for the Fourth Circuit decided, on April 6, 1937, that the amount received was taxable compensation to the recipient.

The cases cited by petitioner may be, as the court said in the *Walker* case, an aid to the reasoning of the fact-finding body in arriving at a conclusion, but they would not be helpful in a case involving conflicting evidence. Those cases cited by petitioner as being in conflict with the decision below were decided before this Court definitely defined in the *Elmhurst* case, and others therein cited, the powers of the appellate courts in cases coming up from the Board of Tax Appeals.

We submit, further, that even if the ultimate finding of the Board be considered a conclusion of law, it was properly left undisturbed. The conclusion is in accord with the principle that payment for services, even though the payment is entirely voluntary, is nevertheless compensation within the statute. *Old Colony Trust Co.* v. *Commissioner,* 279 U. S. 716, 730.

The petitioner relies upon four cases as being in conflict with the present one. The first, *Jones* v. *Commissioner,* 31 F. (2d) 755 (C. C. A. 3d), is the principal reliance of petitioner. That case was decided March 22, 1929, several months before the *Old Colony Trust Co.* case was decided. The case of *Blair* v. *Rosseter,* 33 F. (2d) 286 (C. C. A. 9th), was decided June 17, 1929. It is very probable that the court did not have the benefit of the *Old Colony Trust Co.* decision, which was rendered on June 3, 1929. The case of *Lunsford* v. *Commissioner,* 62 F. (2d) 740 (C. C. A. 6th), is distinguishable for the reason, stressed by the court therein, that the taxpayer had neither been in the employ of nor performed services for the donor. The case of *Cunningham* v. *Commissioner,* 67 F. (2d) 205 (C. C. A. 3d), was decided by the same court which decided the *Jones* case, *supra,* and the reasoning in the two cases is similar. The intervening decision of this Court in the *Old Colony Trust Co.* case was not noted by the court in the *Cunningham* case. In so far as the latter decision was based on the ground that the money "was freely given without any legal liability existing to

necessitate such payment" (p. 205) it failed to apply the correct principle of law established by this Court in the *Old Colony Trust Co.* case.

In any view of the case, therefore, the decision below accords with the applicable principles laid down by this Court, whether the case is controlled by the rule limiting the scope of review of decisions of the Board or by the rule of law that payments to employees and former employees may be compensation even though the company was under no legal obligation to make the payments. It appears to be unnecessary that this Court grant certiorari in the instant case in order to reaffirm these principles, which have here been correctly applied.

CONCLUSION

It is respectfully submitted that the decision below is in accord with the applicable decisions of this Court. The petition should, therefore, be denied.

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APRIL 1937.

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In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 15

ARTHUR G. BOGARDUS, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The memorandum opinion of the United States Board of Tax Appeals (R. 9–22) is not reported. The opinion and dissenting opinion of the Circuit Court of Appeals (R. 63–69) are reported in 88 F. (2d) 646.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 15, 1937 (R. 72). Petition for a writ of certiorari was filed March 20, 1937, and

was granted April 26, 1937 (R. 73). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the sum of $10,000 paid to the petitioner by the Unopco Corporation in 1931 constituted compensation for personal services or a gift.

STATUTE AND REGULATIONS INVOLVED

The statute and regulations involved will be found in the Appendix, *infra,* pp. 32–33.

STATEMENT

The facts as found by the Board of Tax Appeals (R. 10–14) are substantially as follows:

The petitioner was formerly an employee of the Universal Oil Products Company, a South Dakota corporation, organized in 1914, and hereinafter referred to as Universal (R. 10).

At the time of its organization the only asset of Universal was an application for a patent on a process for refining petroleum and manufacturing gasoline. Later it acquired other patents and licensed them to various producers on a royalty basis. From 1922, when it received its first royalty payments of a few thousand dollars, its business improved rapidly, and its royalties had by 1930 become very large. Early in the year 1931 all of its stock was sold to the United Gasoline Corpora-

tion, hereinafter called United, for $25,000,000, under an agreement dated January 2, 1931. (R. 10–11.)

In anticipation of a sale of the stock of Universal, the Unopco Corporation, hereinafter called Unopco, had been organized. As part of the agreement of January 2, 1931, certain "liquid assets," including cash, securities, and accounts receivable, of a value of approximately $4,100,000 were transferred to Unopco before the consummation of the sale of Universal stock. It was provided in the sale agreement that a part of the proceeds of the sale of Universal stock and a certain amount of the assets transferred to Unopco should be held as a "guarantee fund" for payment of Universal's unsettled liabilities. (R. 11, 30.)

Unopco had been engaged in no business activities up to the time of the sale of the Universal stock, and since that time its only business has been the investment and management of the assets acquired from Universal. All of the former stockholders of Universal became stockholders of Unopco, with the same proportionate stockholdings. All the Universal stock was sold to United for cash, and none of the Unopco stockholders thereafter held any stock in Universal or United. Universal continued to carry on the same business after its stock had been acquired by United. (R. 11, 30.)

A few days after the sale of Universal stock the stockholders of Unopco, who were the former

stockholders of Universal, held a meeting at which it was proposed that they show their appreciation for the loyalty and support of some of the employees of Universal by making them a "gift" or "honorarium" (R. 11–12). Such resolution was formally adopted at a meeting of the Board of Directors of Unopco on January 9, 1931, and a similar resolution was adopted by the stockholders on January 10, 1931 (R. 12). The latter resolution was as follows (R. 12):

> *Resolved,* That the following recommendations made by the Board of Directors to the stockholders of this Corporation in the meeting of the Board of Directors held on January 9, 1931, viz.:
>
> That the sum of Six Hundred Seven Thousand Five Hundred Dollars ($607,500) be appropriated, paid and distributed as a bonus to sixty-four (64) former and present employees, attorneys and experts of Universal Oil Products Company (the corporation of that name referred to in the meeting of this Corporation held on the fifth and sixth days of January, 1931) in recognition of the valuable and loyal services of said employees, attorneys and experts to said Universal Oil Products Company; such sum to be distributed among said sixty-four (64) employees, attorneys and experts in such amounts to each employee, attorney and expert as the Board of Directors of this corporation shall determine;

be and the same are hereby in all things approved; and

Resolved further, That this Corporation do appropriate, pay and distribute the said sum of Six Hundred Seven Thousand Five Hundred Dollars ($607,500) as a bonus to sixty-four (64) former and present employees, attorneys and experts of said Universal Oil Products Company; in recognition of the valuable and loyal services of said employees, attorneys and experts to said Universal Oil Products Company; said sum to be distributed among said sixty-four (64) employees, attorneys and experts in such amounts to each employee, attorney and expert, as the Board of Directors of this Corporation shall determine.

Thereafter, a list of those who were to receive the payments authorized under the resolution was prepared by the officers of Unopco. The payments ranged from $500 to $100,000, and each recipient was or had been an employee, attorney, or expert of Universal, except one who was the sister of an employee who had been killed in an accident. None had ever been employed by Unopco or by any of the former stockholders of Universal. It was stipulated that neither Unopco nor any of its stockholders, nor any of the stockholders of Universal, were under any legal or other obligation to pay any salary, compensation or consideration of any kind to any of the recipients of the distributed amounts. (R. 12–13.)

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In making these payments by checks the president of Unopco advised the recipients that the payments were gifts from the stockholders of the corporation and need not be reported in income tax returns (R. 13, 43–49). Neither Unopco nor Universal nor United, nor any of the stockholders of those companies, ever made or claimed any deduction in their income tax returns for these distributions. On the books of Unopco the payments were charged to surplus account in January, 1931. (R. 13.)

SUMMARY OF ARGUMENT

A. The sole question in this case is whether the payment made to the petitioner in 1931 pursuant to resolutions of the directors and stockholders of Unopco represented compensation for services or a gift to him. The court below affirmed the Board's decision that it was compensation, and three other Circuit Courts of Appeals have rendered the same decision in cases involving other taxpayers who received distributions from Unopco at the same time, under identical circumstances, and whose cases were consolidated with this case before the Board. The question as to whether the payment by Unopco to the petitioner constitutes compensation or a gift cannot, in view of the decision of this Court in *Helvering* v. *Tex-Penn Oil Co.*, 300 U. S. 481, certainly be said to be one of fact alone. However, intent or motive is largely controlling and, as four Circuit Courts of Appeals have affirmed the Board

of Tax Appeals in determining the payments to be compensation, of which three of those courts reached that conclusion upon an independent examination of the facts, the concurrent decision of the Board and appellate courts as to the intent of the payer should be highly persuasive upon this Court and should not be disturbed unless clearly inconsistent with the findings of primary facts.

B. The evidence shows that the payments were made as compensation. They were made pursuant to resolutions of the Board of Directors and stockholders of Unopco which contained language clearly indicating an intent to compensate.

C. The fact that the payment in this case was voluntarily made does not prevent its being regarded as compensation. Section 22 (a) of the Revenue Act of 1928, *infra,* provides for the taxation of "compensation for personal service, of whatever kind and in whatever form paid", and the regulations promulgated under that Act, as well as those promulgated under previous and subsequent Acts, recognize that voluntary payments for services are taxable. These regulations have the force and effect of law. Moreover, in cases involving questions substantially the same as the one here involved the courts have repeatedly held that where an employer intends to pay additional compensation for services rendered, the fact that the payment was voluntary does not prevent its being treated as compensation. The few early decisions

to the contrary are against the weight of authority or have been overruled.

D. It is also immaterial that the compensation was paid by Unopco for services rendered directly to Universal. Unopco acquired part of the assets of Universal and had the same stockholders. Both these stockholders and Unopco had derived substantial benefit from the services of the petitioner; they recognized that the compensation hitherto paid him had not been commensurate with the value of his services and made the additional payment to him, not from a motive of affection but from a desire to do justice. Under the decided cases an additional sum paid with the motive of compensating one whose services have benefited the payer, even though indirectly, constitutes compensation and not a gift.

The decision involves no conflict with Section 22 (b) (3), *infra*, providing that the value of property acquired by gift shall not be included in gross income. That section contains no definition of the word "gift", and it cannot be construed independently of Section 22 (a), which provides for the taxation of all compensation. The court below has drawn a logical line of division between the two.

E. The fact that Unopco did not deduct the amount as compensation in its return also is unimportant, especially since the statutory provisions which permit the allowance of deductions for compensation are not identical with those requiring compensation to be reported as income.

ARGUMENT

THE PAYMENT BY UNOPCO TO THE PETITIONER WAS COMPENSATION AND NOT A GIFT, AND WAS TAXABLE UNDER THE STATUTE

A. THOUGH THE QUESTION BE NOT SOLELY ONE OF FACT, INTENT OR MOTIVE IS LARGELY CONTROLLING, AND THE BOARD OF TAX APPEALS AND FOUR CIRCUIT COURTS OF APPEALS CONCUR IN THE CONCLUSION THAT THE PAYMENT WAS INTENDED TO COMPENSATE FOR PAST SERVICES

The sole question in this case is whether the payment made to the petitioner in 1931 pursuant to resolutions of the directors and stockholders of Unopco represented compensation for services or a gift to him. The court below affirmed the Board's determination that it was compensation and taxable income. Three other Circuit Courts of Appeals have rendered the same decision in cases involving other taxpayers who received distributions from Unopco at the same time and under the identical circumstances. *Walker* v. *Commissioner,* 88 F. (2d) 61 (C. C. A. 1st); *Simpkinson* v. *Commissioner,* 89 F. (2d) 397 (C. C. A. 5th); *Hall* v. *Commissioner,* 89 F. (2d) 441 (C. C. A. 4th). To the same effect is *Olsen* v. *Helvering,* 88 F. (2d) 650 (C. C. A. 2d), decided by the same Circuit Court of Appeals as the instant case.[1]

It was the position of the respondent in his brief in opposition, No. 830, October Term, 1936, that

[1] In the *Olsen* case the appellant was the administrator of the deceased distributee of Unopco. The merits of the case were decided on the authority of the instant case, but procedural questions not here involved were also discussed.

the question whether the payments by Unopco to the employees, experts, and attorneys of Universal constituted compensation or gifts was purely one of fact, and that the court below would have been powerless to substitute its own judgment for that of the Board of Tax Appeals had it been so inclined. The brief in opposition was written after the decision of this Court in *Elmhurst Cemetery Co.* v. *Commissioner,* 300 U. S. 37, and before the decision in *Helvering* v. *Tex-Penn Oil Co.,* 300 U. S. 481. In view of the decision in the latter case (p. 491) that the ultimate finding or conclusion of fact that Tex-Penn received cash as well as stock in consideration for its assets was "a conclusion of law or at least a determination of a mixed question of law and fact," we feel unable to press the contention made in the brief in opposition that the question of the nature of the payments must necessarily be viewed as one of fact alone.[2]

[2] It should, however, be noted that most of the courts which have decided substantially similar questions have considered the question to be one of fact depending upon the intent or motive of the payer. See *Fisher* v. *Commissioner*, 59 F. (2d) 192 (C. C. A. 2d); *Schumacher* v. *United States*, 55 F. (2d) 1007 (C. Cl.); *Bass* v. *Hawley*, 62 F. (2d) 721 (C. C. A. 5th); *Botchford* v. *Commissioner*, 81 F. (2d) 914 (C. C. A. 9th); *Levey* v. *Helvering*, 68 F. (2d) 401 (App. D. C.); *Lougee* v. *Commissioner*, 63 F. (2d) 112 (C. C. A. 1st). If the rule of the *Tex-Penn* case should not be taken to be one of general application, and if the present question is viewed as one of fact alone, this Court need examine no other question in the present case. It is not argued (see Br. for Pet. 30–32) there was no substantial evidence to support the determination of the Board.

However, we point out that the court below and the three other Circuit Courts of Appeals which have reviewed the circumstances of the transaction out of which the present question arises have sustained the Board's finding that the payments were intended as compensation and not as gifts; in this case and in the *Hall* and *Simpkinson* cases, *supra*, the courts have reached the same conclusion upon an independent examination of the facts. This conclusion of the Board and of four Circuit Courts of Appeals as to the intent of the payer, even if this narrow question is not viewed as one of fact alone, should be highly persuasive upon this Court and should not be disturbed unless clearly inconsistent with the findings of primary facts.

B. THE EVIDENCE SHOWS THE PAYMENTS WERE MADE AS COMPENSATION

We submit that the stipulated facts and the testimony of the petitioner's witnesses establish that the payments made to the petitioner and others were made with the motive of compensating the individuals receiving them and not as gifts. It is true that it was stipulated that none of the payments made by Unopco to the petitioner and others was made "in payment for or in consideration of any services rendered or ever to be rendered, or of any consideration of any kind or character paid or given, or ever to be paid or given by any of said employees, attorneys or experts * * * to said Unopco Corporation" (R. 40); and that "the pay-

ments were not made or intended to be made by said Unopco Corporation or any of its stockholders as payment or compensation for any services rendered or to be rendered or for any consideration given or to be given by any of said employees, attorneys or experts to said Unopco Corporation or to any of its stockholders" (R. 41); but these statements mean merely that no services were directly rendered to Unopco or to its stockholders, and not that they had not received benefits for the services which were directly rendered to another company. With the exception of one payment to the sister of a deceased employee, all the payments were made to former employees of Universal or to attorneys and experts who had rendered services to that company (R. 31–33). The stockholders of Unopco had all been stockholders of Universal (R. 36), and the president of Universal became the president of Unopco (R. 30–31). The payments were made pursuant to resolutions of the Board of Directors and of the stockholders, *supra*, pp. 4–5, which provided for the distribution of certain amounts as a "bonus" and "in recognition of the valuable and loyal services" of the distributees. The latter phrase clearly indicates an intention to compensate, and, as the court below pointed out (R. 67), the use of the word "bonus" is itself significant; neither "bonus" nor "recognition of * * * services" suggests a pure donation. See the *Simpkinson, Walker, Schumacher,*

and *Bass* cases, *supra,* and *Noel* v. *Parrott,* 15 F. (2d) 669 (C. C. A. 4th). In the case of *Bass* v. *Hawley* (C. C. A. 5th), the court said (62 F. (2d) 721, 723):

> That only is a gift which is purely such, not intended as a return of value or made because of any intent to repay another what is his due, but bestowed only because of personal affection or regard or pity, or from general motives of philanthropy or charity. Those payments made because of past services, but over and above what was contracted and compellable to be paid, have been called additional compensation and bonuses, and are taxable income to the recipient. * * * The meaning in this connection of additional compensation as a payment for services above what is demandable is clear. Bonus has a parallel meaning: "Something given in addition to what is ordinarily received by or strictly due to the recipient; money given in addition to an agreed compensation." Webster's International Dictionary. Bearing in mind the proper meaning of these terms in looking at the documents that attended these payments we are at once impressed that in no case were they called gifts, but in every instance compensation, additional compensation or bonuses to employees was the term used. Even the card which accompanied each says, "In appreciation", which connotes that something has been appraised and its value is acknowledged.

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In *Noel* v. *Parrott, supra,* holding that a distribution of assets of a corporation to its officers and employees was not a gift, the court said (15 F. (2d) 669, 671):

> If we look to the resolutions of July 14, 1919, it appears that the appropriations from the assets was for distribution to "certain officers and employees of the company", and that the executive committee was authorized to make such distributions as they might deem "wise and proper." This negatives the idea that a gift was intended; for the distribution was to be made to those who had rendered services to the company; i. e., to those from whom the company had received a consideration in the past. It was to be made as the executive committee might deem wise and proper; i. e., in accordance with the interests of the corporation and the deserts of the persons to be benefited by the distribution. The distribution was thus to be in the nature of a bonus, which "is not a gift or gratuity, but a sum paid for services, or upon a consideration in addition to or in excess of that which would ordinarily be given." *Kenicott* v. *Wayne County,* 16 Wall. 452, 471 (21 L. Ed. 319); *Payne* v. *United States,* 50 App. D. C. 219, 269 F. 872.

Rogers v. *Hill,* 289 U. S. 582, 591–592, held that the payment to a corporation's officer of percentages of profits under a standing by-law enacted by the stockholders may, where business rapidly increases, become so great that the bonus has no rela-

tion to the value of the services and is a gift, or spoliation of the corporate property. It is cited by petitioner in support of the statement that the word "bonus" in a corporate resolution is not conclusive that a payment to an employee is additional compensation rather than a gift, but the opinion does not, it should be noted, indicate that the word "bonus" does not *ordinarily* imply compensation.

The petitioner relies upon testimony of A. F. Reichmann (R. 30–31) to the effect that the president, H. J. Halle, characterized the payments as gifts. This testimony was admitted over the objection of the attorney for the Commissioner (R. 29), but in any event it is conflicting and tends to show that Mr. Halle labelled the payments as gifts because he assumed that any payments made voluntarily were gifts—an assumption which is erroneous for reasons herein stated—and not because they were not intended as compensation. Thus, this testimony is to the effect that in broaching the subject to the stockholders, Mr. Halle stated that Universal had been phenomenally successful and had profited all of them very largely; that its success was attributable in part to the loyal services of a number of employees; and that it would be a nice and a generous thing for the stockholders to show their appreciation and remember the employees in the form of "a gift or honorarium." The word "honorarium" used by Mr. Halle suggests compensation, as the court below pointed out.

See, also *McDonald* v. *Napier,* 14 Ga. 89, 105; Bouvier's Law Dictionary, Third Revision (1914), Vol. 2, p. 1456; Webster's Unabridged Dictionary. See, *contra, Cunningham* v. *Commissioner,* 67 F. (2d) 205 (C. C. A. 3d), discussed *infra,* p. 20. This evidence shows clearly that the stockholders were making the payments in appreciation for past services and not as pure gratuities. There were also introduced in evidence, over the objection of the attorney for the Commissioner (R. 29), letters of Mr. Halle which characterized the payments as gifts which were not subject to tax. Some of these, however, stated that the payments were made in appreciation of the old relationship, association or support (R. 43–49). In any event, as the Circuit Court of Appeals for the Fifth Circuit stated in the *Simpkinson* case (p. 399), more significance should be attached to the resolutions of the Board of Directors and of the stockholders than to the statements of the president.[3] In that case the court said (89 F. (2d) 397, 399):

> The minutes thus speaking are the best evidence of the corporate act and intention.

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[3] The petitioner cites *Levey* v. *Helvering,* 68 F. (2d) 401 (App. D. C.), as authority for the proposition that the language of the corporate resolution is not controlling. But in that case the court held that the payment constituted compensation, notwithstanding that it was characterized in the resolution as a gift. A corporation may regard any payment in addition to agreed compensation as a gift and incorrectly label it as such, but it would not be likely to label as compensation a payment intended as a gift.

> The president could not alter them by his expressions in carrying out the corporation's directions. It, not he, was making the benefactions. What he said indeed smacks somewhat of an afterthought.

See, also, *Anderson* v. *Commissioner,* 31 B. T..A. 197, affirmed, *per curiam,* 79 F. (2d) 979 (C. C. A. 2d), and *Southern Power & Mfg. Co.* v. *Commissioner,* 82 F. (2d) 104, 105 (C. C. A. 5th).

We submit, therefore, that the evidence sustained the Board's determination that the payments were intended as compensation and not as gifts.

C. THAT THE PAYMENT WAS VOLUNTARY DOES NOT NECESSARILY CONSTITUTE IT A GIFT

The question whether the fact that the payments were voluntary prevents their being regarded as anything other than gifts, notwithstanding that they were intended as compensation, presents no difficulty. The decisions of the courts and the long-continued administrative construction of the taxing statute establish that the voluntary character of the payments is immaterial.

Section 22 (a) of the Revenue Act of 1928 (Appendix, *infra,* p. 32) provides that the gross income shall include income derived from "salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid." Article 52 of Regulations 74, *infra,* p. 32, provides that tips, marriage fees paid to clergymen, and other amounts which are obviously voluntary pay-

ments for services, constitute income to the recipient. Article 128, Regulations 74, *infra*, p. 33, likewise provides that bonuses paid to employees will constitute allowable deductions to the employer when such payments are made in good faith and as additional compensation for services actually rendered by the employees, provided they do not exceed a reasonable compensation for the services rendered. Similar regulations have been in effect under previous and subsequent Revenue Acts. See Articles 32 and 107 of Regulations 45 (1920 Ed.) and Regulations 62; Articles 32 and 108 of Regulations 69; Articles 52 and 128 of Regulations 77; Articles 22 (a)–2 and 23 (a)–7 of Regulations 86. There has been no material change in the statutory provisions with respect to which these regulations have been issued. Hence they have the force and effect of law. *Brewster* v. *Gage*, 280 U. S. 327, 337; *Helvering* v. *Bliss*, 293 U. S. 144, 151; *Zellerbach Paper Co.* v. *Helvering*, 293 U. S. 172, 179–180; *Murphy Oil Co.* v. *Burnet*, 287 U. S. 299, 302–303.

In *Old Colony Tr. Co.* v. *Commissioner*, 279 U. S. 716, the Court held that income taxes paid by an employer for his employee constituted income to the employee, and said (p. 730):

> Nor can it be argued that the payment of the tax in No. 130 was a gift. The payment for services, even though entirely voluntary, was nevertheless compensation within the statute.

The contention that payments which were wholly voluntary on the part of the employer are not to be treated as compensation to the employee has repeatedly been rejected by other courts. *Fisher* v. *Commissioner,* 59 F. (2d) 192 (C. C. A. 2d); *Levey* v. *Helvering,* 68 F. (2d) 401 (App. D. C.); *Botchford* v. *Commissioner,* 81 F. (2d) 914 (C. C. A. 9th); *Davis* v. *Commissioner,* 81 F. (2d) 137 (C. C. A. 6th); *Bass* v. *Hawley,* 62 F. (2d) 721 (C. C. A. 5th); and *Schumacher* v. *United States,* 55 F. (2d) 1007 (C. Cls.). See, also, *Weagant* v. *Bowers,* 57 F. (2d) 679 (C. C. A. 2d); *United States* v. *McCormick,* 67 F. (2d) 867 (C. C. A. 2d). The petitioner emphasizes that in this case it was stipulated that the payments were made without "legal or other obligation." (R. 41.) But that is merely stating that they were voluntary. In *Walker* v. *Commissioner* (C. C. A. 5th), one of the companion cases to this case, the court said (88 F. (2d) 61, 62–63):

> In *Old Colony Trust Company* v. *Commissioner,* 279 U. S. 716, 730, 49 S. Ct. 499, 504, 73 L. Ed. 918, there is a dictum to the effect that "the payment for services, even though *entirely voluntary* [is] nevertheless compensation within the statute." [Italics supplied.] Here, according to the resolution, the money "paid and distributed as a bonus to sixty-four (64) former and present employees, attorneys, and experts of Universal" was "in recognition of the valuable and loyal services of said employees, attorneys,

> and experts to said Universal." And if the dictum in the *Old Colony Trust Company* case states the law governing the matter, the payment and distribution, though entirely voluntary, being for "valuable and loyal services" was, nevertheless, compensation within the statute, and, if so, taxable to the recipients. *The phrase "entirely voluntary" payment for services used in that opinion means substantially the same as the stipulation of the parties in this case that "neither Unopco nor any of its stockholders, nor the stockholders of Universal were at any time under any legal or other obligation 'to pay any of said employees, attorneys, or experts, including petitioners, any salary, compensation, or consideration of any kind.'"* [Italics supplied.]

The petitioner cites (Br. 15) *Jones* v. *Commissioner,* 31 F. (2d) 755 (C. C. A. 3d), *Blair* v. *Rosseter,* 33 F. (2d) 286 (C. C. A. 9th), and *Cunningham* v. *Commissioner,* 67 F. (2d) 205 (C. C. A. 3d), as opposed to these contentions. The *Jones* case was decided before, and the *Rosseter* case shortly after, *Old Colony Tr. Co.* v. *Commissioner, supra,* and that decision was not mentioned in the *Cunningham* case, which was decided by the same court as the *Jones* case. It also appears that the Circuit Court of Appeals for the Ninth Circuit, which decided the *Rosseter* case, has more recently decided *Botchford* v. *Commissioner, supra,* which takes a contrary view and may be taken to have overruled

the earlier decision on that point. In any event, these decisions are against the clear weight of authority. It not only has been held that the recipient of a voluntary payment may be taxed on it, but also that the taxpayer making it may claim a deduction if the compensation is reasonable. *Lucas* v. *Ox Fibre Brush Co.*, 281 U. S. 115. See also *Helvering* v. *J. L. Brandeis & Sons*, 75 F. (2d) 487 (C. C. A. 8th); *Liberty Hosiery Mills* v. *Commissioner*, 31 B. T. A. 64; Article 128, Regulations 74, *infra*, p. 33.

The petitioner cites (Br. 24–30) a group of English cases holding that voluntary payments for past services are gifts. We do not think these cases require discussion in view of the many Federal decisions dealing with the question and the many differences between the Federal and the English tax laws. See *Merchants' L. & T. Co.* v. *Smietanka*, 255 U. S. 509, 521–522.

The petitioner suggests (Br. 18) that in the cases holding that voluntary payments made by a corporation constituted compensation, one of these three facts appeared: (1) the stockholders had not ratified the payments; (2) there was legal consideration for the payments; or (3) the corporation had deducted the payments in the return. We do not see that any of these factors is necessary for a payment to be compensation. It is true that in some of the cases these facts have been given some weight, but no court has stated that the existence of

one of them was indispensable. None of these three elements was present in *Bass* v. *Hawley*, 62 F. (2d) 721 (C. C. A. 5th), or in *Schumacher* v. *United States*, 55 F. (2d) 1007 (C. Cls.) The distinction which the petitioner seeks to draw between this case and the *Schumacher* and *Bass* cases, on the ground that in the latter cases the stockholders' resolutions did not authorize the payment of gifts while in the instant case they did, is not sound. In the *Schumacher* and *Bass* cases, both of which involved the same facts, the Board of Directors wrote to the stockholders requesting that the Board be authorized "in recognition of the long and faithful service of the officers and employees" to pay them "additional compensation" not in excess of a certain sum. Enclosed with this communication was a letter to be signed by each stockholder and which was signed by each, containing a blanket ratification of what the Board of Directors had proposed in relation to this and other matters and stating that they understood that there were certain unsettled expenses—"bonuses to employees"—to be paid. See the *Schumacher* case, at page 1008. Thus it will be seen that the word "bonuses" was used in the stockholders' authorization. In the instant case the stockholders authorized the payment of a certain amount as a "bonus" "in recognition of valuable and loyal services." The stockholders did not authorize the making of a gift in this case any more than they did in the *Bass* and *Schumacher* cases.

The petitioner apparently concedes that there need be no legal obligation to make the payment but claims that there must be at least a moral obligation to do so, and emphasizes that in this case there was a stipulation (R. 41) that neither a legal nor other obligation existed. But the same thing was true in the *Bass* and *Schumacher* cases. See also *Botchford* v. *Commissioner, supra.*

Thus the fact that the payments to the employees were voluntary, notwithstanding that they were intended as compensation, does not, under the statute involved and the applicable cases, make the payments gifts, nor does it preclude them from being compensation.

D. THAT THE PETITIONER WAS NOT EMPLOYED BY UNOPCO DOES NOT PRECLUDE THE PAYMENT FROM BEING COMPENSATION

It cannot be said as a matter of law that one does not derive any income from services unless he directly renders the services to the payer of the compensation. The statute taxes compensation for personal services of whatever kind and in whatever form paid. Section 22 (a), Revenue Act of 1928, *infra.* The motive to compensate existed in this case, even though Unopco was not directly the beneficiary of the services. Indirectly it and its stockholders received a benefit from the services already rendered to Universal, for the reason that the stockholders had received increased dividends as the result of those services and they had helped to

build up the assets which Unopco acquired. As the Board stated (R. 19), Unopco occupies the same economic position with reference to the recipients as Universal had occupied; it assumed the reason and motive to give bonuses to the former employees of Universal just as it assumed the obligation to pay its unsettled liabilities (R. 19). The fact that the organization of Unopco had been completed and the economic interests of the former stockholders of Universal had been adjusted without providing for these payments does not negative this conclusion. It merely shows that Unopco and its stockholders tardily recognized that everyone except the former employees of Universal had been taken care of and that in justice they were entitled to recognition.

A similar question arose in *Bass* v. *Hawley, supra,* and *Schumacher* v. *United States,* discussed *supra,* p. 22. Those cases both involved the same facts. A holding company had made payments to the employees of its operating company, but both courts held that the payments represented compensation. In *Bass* v. *Hawley* the court said (62 F. (2d) 721, 723):

> Again it is objected that the employer was not the Holding Company or its stockholders, but was the Railroad Company, and that the Railroad Company alone could make additional compensation; that a voluntary payment by any one else is necessarily a gift. The objection would have force where

> the third person had no interest in the employment and no cause to feel obligated to compensate the service. But in this case, although the stockholders authorized the payment, it was made out of funds recently belonging to the Holding Company as the proceeds of the sale of its assets, and the Holding Company was the sole owner of the Railroad Company.

As the court below pointed out, the fact that the recipients of the bonus had not been employees of Unopco or its shareholders does not mean that the shareholders had not benefited from their services. In considering the same issue in *Walker* v. *Commissioner, supra,* the court said (88 F. (2d) 61, 63):

> The petitioners insist that because Unopco was a separate corporation from that of Universal as a matter of law it could not compensate the past employees of Universal for services rendered that company. But the services that were rendered Universal before the sale were rendered to the very same stockholders who voted the additional payments, and the assets of Unopco were a part of the assets of Universal which had been enhanced by such services. We see no reason why the stockholders of Unopco, appreciating the value of those services to them and that without such services Unopco might have had no assets, could not grant compensation therefor. *Bass* v. *Hawley* (C. C. A.) 62 F. (2d) 721.

The *Hall* and *Simpkinson* cases, *supra,* had language to the same effect, the court in the latter case saying (89 F. (2d) 397, 399):

> But it is argued that since Kerr and the other beneficiaries were not and never had been employees of Unopco, or of its stockholders as individuals, the resolutions in rewarding their service to another corporation necessarily authorized only gifts. That contention was made and rejected in the *Bass* and *Schumacher* Cases, *supra.* The same persons in the same proportion owned both Universal Oil Products Company and Unopco. Unopco was in fact the residuum of Universal Oil Products Company, the administrator of its affairs reserved from the sale. This payment from the reserved assets was in recognition of a felt moral obligation of the old business. From Kerr's standpoint he received it for his past services, and it was immaterial whether paid technically by the one corporation or the other.

The case of *Lunsford* v. *Commissioner,* 62 F. (2d) 740 (C. C. A. 6th), relied upon by the petitioner, is not opposed to these decisions. Lunsford, the recipient of the payment in that case, was local manager of some properties of the Fordson Coal Company, which was controlled by the Ford Motor Company, and represented the coal company in negotiations that culminated in the purchase of the properties of the Pond Creek Coal

Company. The Pond Creek Coal Company considered the deal very satisfactory and informed Lunsford that it would like to make him a gift, if this action would meet with the approval of the Ford Motor Company. After obtaining the approval of the latter company, Lunsford accepted the payment. At no time had he been employed by or rendered any services, directly or indirectly, to the Pond Creek Company; in his only contact with that company his interest had been adverse, and the payment was made "in token of friendship and esteem" and not in recognition of past services. The instant case is distinguishable. Here the payment by Unopco was intended as compensation for services which had benefited the stockholders of Unopco when they were stockholders of Universal and which, by assisting Universal in its great success, had contributed to the assets acquired by Unopco. While in this case there was "no legal or other obligation" to make the payment to the petitioner and other employees, and there was no direct consideration to Unopco for the payment, there was a strong inducement to do so, based not upon the fact that the stockholders of Unopco had a personal affection for the recipients who had once been associated with them in business, but upon a recognition that the petitioner and the others had contributed to the financial success of the stockholders and had helped make the creation

of Unopco possible without having received compensation commensurate with the value of this contribution.

The petitioner argues (Br. 14) that, if this reasoning is carried to its logical conclusion it must follow that there never can be a gift by an employer to an employee, for the reason that a payment to an employee must always be made in recognition of services. We do not concede that that is true. We agree with the court below that an employer may make a gift to an employee without meaning it as compensation, although, because of the very nature of the relationship, such cases are rare. Article 52 of Regulations 74, *infra,* recognizes that this is true. The employer may, for example, give an employee money to meet unusual family expenses, without implying or feeling that the services of the employee have not been fully paid for. Such a payment would clearly be a gift. But where the employer recognizes that the agreed compensation paid to the employee was not commensurate with his proven value to the business, we think that an additional sum paid in recognition of that fact is just as clearly compensation.

There is nothing in Section 22 (b)(3), *infra,* p. 32, which is inconsistent with this view. That section merely provides that the value of property acquired by gift, bequest, devise, or inheritance shall not be included in gross income. There is no definition of the word "gift" in this section. Moreover, it grants an exemption from tax and is to be

strictly construed. *Heiner* v. *Colonial Trust Co.*, 275 U. S. 232, 235; *Millsaps College* v. *Jackson*, 275 U. S. 129, 132; *Bowers* v. *Lawyers Mortgage Co.*, 285 U. S. 182, 187. The provision cannot be construed without regard to other provisions of the Act. *Alexander* v. *Cosden Co.*, 290 U. S. 484, 496; *Helvering* v. *Morgan's, Inc.*, 293 U. S. 121, 126. It is necessary to adopt such a construction of the word "gift" in that section as can be reconciled with the provisions of Section 22 (a) providing for the inclusion in gross income of "compensation for personal service, of whatever kind and in whatever form paid". The problem of drawing a line between a gift and compensation is similar to that involved in *United States* v. *Merriam*, 263 U. S. 179, *Ream* v. *Bowers*, 22 F. (2d) 465 (C. C. A. 2d), and *Rose* v. *Grant*, 39 F. (2d) 338 (C. C. A. 5th), petition for certiorari dismissed, 283 U. S. 867, where the courts found it necessary to distinguish between nontaxable bequests to executors on the one hand and compensation fixed by will for services rendered by the executor on the other. We believe that the court below has laid down a logical rule for distinguishing between gifts and compensation in cases of this character and that no conflict between the two sections of the statute is involved in that rule.

E. THAT UNOPCO DID NOT DEDUCT THE PAYMENT AS BUSINESS EXPENSES DOES NOT CONSTITUTE IT A GIFT

Finally, while the fact that the employer has deducted the payments as compensation has been regarded as being in the nature of an admission that

he intended to pay compensation (see *Fisher* v. *Commissioner, supra; Botchford* v. *Commissioner, supra; Anderson* v. *Commissioner, supra*), the fact that he has not deducted them is not a clear indication to the contrary (*Bass* v. *Hawley, supra; Schumacher* v. *United States, supra; Levy* v. *Helvering, supra*). The test as to what constitutes compensation within the broad language of Section 22 (a), *infra,* does not necessarily determine what constitutes an allowable business expense under Section 23 (a) of the 1928 Act. Apart from the fact that a taxpayer cannot control the application of a Revenue Act by a failure to claim allowable deductions, Section 23 (a) provides only for the deduction of "ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered." It might be argued against the allowance of such a claim in this case that the recipients of the bonus were not employees of Unopo and hence that no deduction is allowable under Section 23 (a). On the other hand, it might be urged that the claim would be allowable for the reason that the stockholders, who were in reality the employers to whom the past services had been rendered, themselves chose to brush aside the separate corporate entities in recompensing those who had labored for them under a different corporate name. Whatever theory should be adopted as to the deductibility of the amounts by the corporation would have no

bearing on the question whether they constituted income to the recipients. *Simpkinson* v. *Commissioner, supra.*

We think it unnecessary to speculate as to whether the corporation might have been required to pay a tax on these payments under a gift tax statute, for the reason that there was no gift tax in effect during the taxable year here involved; and that in any event the question as to whether a tax should be imposed on the employer under the particular provisions of a gift tax statute would not determine whether the employee could be made subject to an income tax. We know of no case, however, in which a gift tax has been imposed on payments similar to those here involved and the petitioner has cited none.

CONCLUSION

The decision of the court below should be affirmed.

Respectfully submitted.

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OCTOBER 1937.

APPENDIX

Revenue Act of 1928, c. 852, 45 Stat. 791:

SEC. 22. GROSS INCOME.

(a) *General definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever.

(b) *Exclusions from gross income.*—The following items shall not be included in gross income and shall be exempt from taxation under this title:

* * * * *

(3) *Gifts, Bequests, and Devises.*—The value of property acquired by gift, bequest, devise, or inheritance (but the income from such property shall be included in gross income);

* * * * *

Treasury Regulations 74:

ART. 52. *Compensation for personal services.*—Commissions paid salesmen, compensation for services on the basis of a percentage of profits, commissions on insurance premiums, tips, pay of persons in the military or naval forces of the United States,

retired pay of Federal and other officers, and pensions or retiring allowances paid by private persons or by the United States (except pensions exempted by section 22 (b) (6), are income to the recipients; as are also marriage fees, baptismal offerings, sums paid for saying masses for the dead, and other contributions received by a clergyman, evangelist, or religious worker for services rendered. However, so-called pensions awarded by one to whom no services have been rendered are mere gifts or gratuities and are not taxable. The salaries of Federal officers and employees are subject to tax. But see section 116 (a). See section 31 and articles 311 and 312 for special provisions relative to credit against the tax on account of earned income, and article 643 as to compensation of State officers and employees.

ART. 128. *Bonuses to employees.*—Bonuses to employees will constitute allowable deductions from gross income when such payments are made in good faith and as additional compensation for the services actually rendered by the employees, provided such payments, when added to the stipulated salaries, do not exceed a reasonable compensation for the services rendered. It is immaterial whether such bonuses are paid in cash or in kind or partly in cash and partly in kind. Donations made to employees and others, which do not have in them the element of compensation or are in excess of reasonable compensation for services, are not deductible from gross income.

U. S. GOVERNMENT PRINTING OFFICE: 1937

SUPREME COURT OF THE UNITED STATES.

No. 15.—October Term, 1937.

Arthur G. Bogardus, Petitioner, *vs.* Commissioner of Internal Revenue.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[November 8, 1937.]

Mr. Justice Sutherland delivered the opinion of the Court.

The question for decision is whether a sum of money received by petitioner in January, 1931, was "compensation" subject to the federal income tax, or a "gift" exempt therefrom. The commissioner held it to be compensation, constituting part of petitioner's gross income, and declared a deficiency. The Board of Tax Appeals sustained the determination of the commissioner; and the court below, upon review, affirmed the order of the Board. 88 F. (2d) 646.

The decisions of other courts of appeal upon the question under review are conflicting. Upon the one side, the First Circuit (*Walker* v. *Commissioner*, 88 F. (2d) 61, Judge Morton dissenting), the Fourth (*Hall* v. *Commissioner*, 89 F. (2d) 441), and the Fifth (*Simpkinson* v. *Commissioner*, 89 F. (2d) 397) lend definite support to the decision of the court below. Upon the other side, more or less definitely to the contrary, are to be found the decisions of the Third Circuit (*Jones* v. *Commissioner*, 31 F. (2d) 755; *Cunningham* v. *Commissioner*, 67 F. (2d) 205), the Sixth (*Lunsford* v. *Commissioner*, 62 F. (2d) 740), and the Ninth (*Blair* v. *Rosseter*, 33 F. (2d) 286). No useful purpose would be served by reviewing these decisions; and we pass to a consideration of the case before us. The facts follow:

The amount ($10,000) received by petitioner was part of a distribution, aggregating over $600,000 made by the Unopco Corporation at the instance of its stockholders to petitioner and others who had theretofore rendered service as employees or in some other capacity to the Universal Oil Products Company. The Universal company was a corporation organized in 1914. In the beginning,

its only asset was an application for a patent for a process for refining petroleum and manufacturing gasoline. It thereafter acquired other patents, which it licensed to various producers on a royalty basis. Beginning in 1922, its business developed increasingly until by 1930 its royalties amounted to about $9,000,000. In January, 1931, its entire stock was sold to the United Gasoline Corporation for $25,000,000. Prior to the sale, and in contemplation of it, the Unopco Corporation had been organized for the purpose of acquiring, and it did acquire, certain assets of the Universal company of the value of over $4,000,000. Up to the time of this acquisition, the Unopco company had never engaged in any business activities, and thereafter its only business was the investment and management of the assets thus acquired.

All of the former stockholders of the Universal company became stockholders of the Unopco, with the same proportionate holdings. None of them, after the sale of the Universal stock, held any stock in the Universal, or in the United Gasoline Corporation. Under its new ownership, the Universal continued to carry on the same business, retaining a large part of its assets. A few days after the sale of the Universal company's stock, the former stockholders, then stockholders of the Unopco, held a meeting at which it was proposed that they show their appreciation of the loyalty and support of some of the employees of the Universal company by making them a "gift or honorarium". A resolution to that effect was adopted at a meeting of the board of directors of Unopco on January 9, 1931, and by the stockholders the following day. By these resolutions, it was resolved that the sum of $607,500 be appropriated, paid and distributed, as a bonus, to 64 former and present employees, attorneys and experts of Universal Oil Products Company, in recognition of the valuable and loyal services of said employees, attorneys and experts to said Universal Oil Products Company. Payments ranged in amount from $100,000 to $500. Some of the recipients had been out of the employ of the Universal company for many years; and one of them was the sister of an employee killed in an explosion about the year 1919.

At the meeting of the former stockholders of Universal, the former president of that company, then president of the Unopco corporation, said that they had reason to congratulate themselves on their great good fortune in the Universal company, which

started with nothing and had been built up in a phenomenal way; that they had profited largely; that during the years when they were struggling and moving forward they had had the loyal support of a number of employees, and he thought it would be a nice and generous thing to show their appreciation by remembering them in the form of a gift or honorarium. All of the stockholders acquiesced, with the result "that it was understood that we would come forward and make these presents or gifts to the employees that were to be slated for it." The matter had theretofore never been discussed among the old stockholders; and this was the first time it had been brought up for consideration. None of the recipients had ever been employed by Unopco or by any of the former stockholders of the Universal. The parties stipulated that neither the Universal company nor the United "was under any legal or other obligation to pay said employees . . . any additional . . . compensation" other than that which they were paid by the Universal company*; and that neither Unopco nor any of its stockholders, nor any of the stockholders of Universal, was at any time under any legal or other obligation to pay any of said employees, attorneys or experts, including petitioner, any salary, compensation or consideration of any kind.

It was further stipulated—"said payments were not made or intended to be made by said Unopco Corporation or any of its stockholders as payment or compensation for any services rendered or to be rendered or for any consideration given or to be given by any of said employees, attorneys or experts to said Unopco Corporation or to any of its stockholders." None of the three corporations or their stockholders ever made or claimed any deduction for federal income-tax purposes in respect of the payments made to the petitioner and the others. Payments were charged, in January, 1931, not to expense but to surplus account on the books of the Unopco company.

The distribution was made to petitioner and the other employees, attorneys and experts by checks, delivered either personally or by mail; and in each instance with the accompanying statement that the moneys represented by such checks were given at the instance of

*The reference to additional compensation paid by the Universal company probably refers to a "bonus", which was clearly compensation, paid by that company to its various employees, some 400 in number, in 1930.

the stockholders of the Unopco Corporation as a gift and gratuity, and were, therefore, not subject to income tax on the part of the recipients.

The Board of Tax Appeals concluded that, from a careful consideration of all the evidence, "the payments made by Unopco to the petitioners and others were additional compensation in consideration of services rendered to Universal and were not tax-free gifts." This, as we recently have pointed out, is "a conclusion of law or at least a determination of a mixed question of law and fact. It is to be distinguished from findings of primary, evidentiary or circumstantial facts. It is subject to judicial review and, on such review, the court may substitute its judgment for that of the board." *Helvering* v. *Tex-Penn Oil Co.*, 300 U. S. 481, 491; *Helvering* v. *Rankin*, 295 U. S. 123, 131. If the conclusion of the board be regarded as a determination of a mixed question of law and fact, it has, as we shall presently show, no support in the primary and evidentiary facts. The ultimate determination, therefore, should be overturned, under the doctrine of *Helvering* v. *Rankin*, *supra*, as a matter of law.

The statutory provisions involved are very plain and direct. Section 22 (a) of the applicable revenue act (45 Stat. 791) provides that "gross income", among other things, includes "compensation for personal service, of whatever kind and in whatever form paid." Subdivision (b) (3), immediately following, provides that "the value of property acquired by gift, bequest, devise or inheritance" shall not be included in gross income and shall be exempt from taxation under the income-tax title.

The court below thought that payments such as are here involved "may be at once 'gifts' under § 22, subdivision (b) (3) and 'compensation for personal service' under subdivision (a)." Such a view of the statute is inadmissible and confusing. The statute definitely distinguishes between compensation on the one hand and gifts on the other hand, the former being taxable and the latter free from taxation. The two terms are, and were meant to be, mutually exclusive; and a bestowal of money cannot, under the statute, be both a gift and a payment of compensation. The court below went on to say that decisions like *Old Colony Trust Co.* v. *Commissioner Int. Rev.*, 279 U. S. 716, proved that payments could be both gifts and compensation for personal services. The most casual reading

of that case shows that it is authority for no such doctrine. There, an employer had paid the income tax assessed upon the salary of an employee. The employee had entered upon the discharge of his duties for the year in question under an express agreement to that effect. Quite evidently the payment, so agreed upon in advance, was in consideration of services to be rendered and in no sense a gift. It was a part of the employee's compensation; and the court so held. The idea that it could be a gift in any sense was definitely rejected. We said (p. 730), "Nor can it be argued that the payment of the tax in No. 130 was a gift. The payment for services, even though entirely voluntary, was nevertheless compensation within the statute."

If the sum of money under consideration was a gift and not compensation, it is exempt from taxation and cannot be made taxable by resort to any form of subclassification. If it be in fact a gift, that is an end of the matter; and inquiry whether it is a gift of one sort or another is irrelevant. This is necessarily true, for since all gifts are made non-taxable, there can be no such thing under the statute as a taxable gift. A *claim* that it is a gift presents the sole and simple question whether its designation as such is genuine or fictitious—that is to say, whether, though *called* a gift, it is in *reality* compensation. To determine that question we turn to the facts, which we have already detailed.

From these we learn that the recipients of the bounty here in question never were employees of the Unopco company, or of any of its stockholders. The Universal company, in whose employ some of the recipients then were, was at the time in no way connected with the Unopco company or any of its stockholders. Some of the recipients had not been in the employ even of the Universal company for many years, and one of them never had been an employee. Neither the Universal company nor any one else was under any obligation, legal or otherwise, to pay any of the recipients, including petitioner, any salary, compensation or consideration of any kind. Such is the express stipulation of the parties. And most significant is the further stipulated fact that the disbursements were *not made or intended to be made* for any services rendered or to be rendered or for any consideration given or to be given by any of said employees, attorneys or experts to said Unopco corporation or to any of its stockholders. If the disbursements had been made by

the Universal company, or by stockholders of that company still interested in its success and in the maintenance of the good will and loyalty of its employees, there might be ground for the inference that they were payments of additional compensation. Compare *Noel* v. *Parrott*, 15 F. (2d) 669. But such an inference, even upon one of these suppositions, well might strain the realities in the light of the foregoing facts. However that may be, the disbursements here were authorized and the burden borne by persons who were then strangers to the Universal company and its employees, under no obligation, legal or otherwise, to that company or to any of its present or former employees. There is entirely lacking the constraining force of any moral or legal duty as well as the incentive of anticipated benefit of any kind beyond the satisfaction which flows from the performance of a generous act. The intent is shown by the appeal made at the stockholders' meeting to the effect that it would be a nice and generous thing for these former stockholders of the Universal to show their appreciation of the past loyalty of that company's employees by remembering them in the form of a "gift or honorarium", and by the common understanding then reached that the stockholders would make the suggested "presents or gifts" to these employees. Quite evidently, none of these stockholders had the slightest notion that a *payment* of compensation was to be made.

In sum, then, the case comes to this: The stockholders of the Unopco, having at the time no connection with the Universal company, but rejoicing in the fact of their own great good fortune, and mindful of the former loyal support of a number of employees of the Universal company, and desiring to remember them "in the form of a gift or honorarium", resolved to make through the Unopco company the distribution in question. In doing so, they were moved, as Judge Swan said in his dissenting opinion below, to an act of "spontaneous generosity." We agree with this dissenting opinion of Judge Swan, and the dissenting opinion of Judge Morton in *Walker* v. *Commissioner, supra,* as stating the correct view of the matter.

The only facts which even seem to militate against this view are (1) that the Unopco stockholders had benefited by the former services of the recipients; (2) that the stockholders at their meeting described the payment as a gift or "honorarium"; and (3) that the

resolutions authorized the payment as a "bonus . . . in recognition of the valuable and loyal services" of the employees, etc.

1. Because the Unopco stockholders had benefited by the past services of the recipients, it by no means follows that the distribution in question was not a gratuity. It nowhere appears in the record that full compensation had not been made for these services. There would seem to be a natural inference to the contrary; and the inference is made determinate by the stipulated fact that no one was under any obligation, legal or otherwise (and this would include a moral obligation, however slight) "to pay any additional compensation." There is no ground for saying that the benefit received and the compensation then paid for it were not equivalents.

2. It is said that the word "honorarium" always denotes a compensatory payment. Without agreeing to this broad generalization, it is enough to say that the word is not here used by itself, but coupled with the word "gift" in the phrase "gift or honorarium". Presumptively, the user of the phrase must have known that the word "gift" did not include a compensatory payment, and it is hardly to be supposed that he would consciously nullify that word by the immediate use of another meaning the opposite. The phrase was used in an informal speech at the stockholders' meeting made by the president of the Unopco company. The whole tone of the meeting indicates that the intention was to make gifts in recognition of, not payments for, former services. The conclusion in which the stockholders acquiesced was that they would come forward and make these "presents or gifts" to the employees. In the light of all the circumstances, the absence of moral or other obligation and of any expectation of future benefit, it is reasonable to conclude that the word "honorarium", if the court below correctly defined it, was loosely and inaccurately used.

3. The resolutions, which employ the word "bonus", were adopted to carry into effect the will of the stockholders expressed at their meeting. What occurred at that meeting, as we have already said, indicated their clear intention to make gifts. And since intention must govern, we must consider the word used in the light of the intention. A similar question was before the Court of Appeals for the District of Columbia in *Levey* v. *Helvering*, 68 F. (2d) 401. There, the corporate resolution characterized the payments to be made to reimburse certain officers for income taxes

paid on salaries as "gifts". But the court held this characterization did not settle the matter. It reviewed the facts and reached the conclusion that in the light of them what was intended was not a gift but a bonus, and decided the case in accordance with that view. In other words, the thing that was decided upon and intended, in that case as in this case, was misdescribed in the resolutions to carry the decision and intention into effect. In *Rogers* v. *Hill*, 289 U. S. 582, 591-592, we held, following the dissenting opinion in the court below, that a bonus payment having no relation to the value of services for which it is given is in reality a gift in part. Certainly, where all the facts and circumstances in the case, including the express stipulation of the parties, clearly show the making and the intent to make a gift, it cannot be converted into a payment for services by inaccurately describing it, in the consummating resolutions, as a bonus.

Some stress is laid on the recital to the effect that the bounty is bestowed in recognition of past loyal services. But this recital amounts to nothing more than the acknowledgment of an historic fact as a reason for making the gifts. A gift is none the less a gift because inspired by gratitude for the past faithful service of the recipient. Compare *Hobart's Admr.* v. *Vail*, 80 Vt. 152.

Judgment reversed.

SUPREME COURT OF THE UNITED STATES.

No. 15.—October Term, 1937.

Arthur G. Bogardus, Petitioner
vs.
Commissioner of Internal Revenue.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[November 8, 1937.]

Mr. Justice Brandeis, Mr. Justice Stone, Mr. Justice Cardozo, and Mr. Justice Black, dissenting.

A payment received as compensation for services is taxable as income, though made without consideration, and hence for many purposes a gift. *Old Colony Trust Co.* v. *Commissioner,* 279 U. S. 716, 730. To hold, as the prevailing opinion seems to do, that every payment which in any aspect is a gift is perforce not compensation, and hence relieved of any tax, is to work havoc with the law. A large body of decisions, whose provenance is *Old Colony Trust Co.* v. *Commissioner,* would be annulled by such a test. See e. g. *Weagant* v. *Bowers,* 57 F. (2d) 679; *Fisher* v. *Commissioner,* 59 F. (2d) 192; *Bass* v. *Hawley,* 62 F. (2d) 721; *United States* v. *McCormick,* 67 F. (2d) 867; *Botchford* v. *Commissioner,* 81 F. (2d) 914; *Schumacher* v. *United States,* 55 F. (2d) 1007. Cf. *Lucas* v. *Ox Fibre Brush Co.,* 281 U. S. 115. Their teaching makes it plain that the categories of "gift" and "compensation" are not always mutually exclusive, but at times can overlap. What controls is not the presence or absence of consideration. What controls is the intention with which payment, however voluntary, has been made. Has it been made with the intention that services rendered in the past shall be requited more completely, though full acquittance has been given? If so; it bears a tax. Has it been made to show good will, esteem, or kindliness toward persons who happen to have served, but who are paid without thought to make requital for the service? If so, it is exempt.

We think there was a question of fact whether payment to this petitioner was made with one intention or the other. A finding

either in his favor or against him would have had a fair basis in the evidence. It was for the triers of the facts to seek among competing aims or motives the ones that dominated conduct. Perhaps, if such a function had been ours, we would have drawn the inference favoring a gift. That is not enough. If there was opportunity for opposing inferences, the judgment of the Board controls. *Elmhurst Cemetery* v. *Commissioner*, 300 U. S. 37; *Helvering* v. *Tex-Penn Oil Co.*, 300 U. S. 481.